

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-7675

B

In The
United States Court of Appeals
For the Second Circuit

P/S

THOMAS W. EGGERT,

Plaintiff-Appellant,

vs.

NORFOLK & WESTERN RAILWAY COMPANY and
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants-Appellees.

**BRIEF FOR PLAINTIFF-APPELLANT
WITH APPENDIX**

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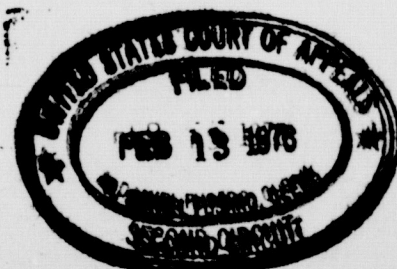
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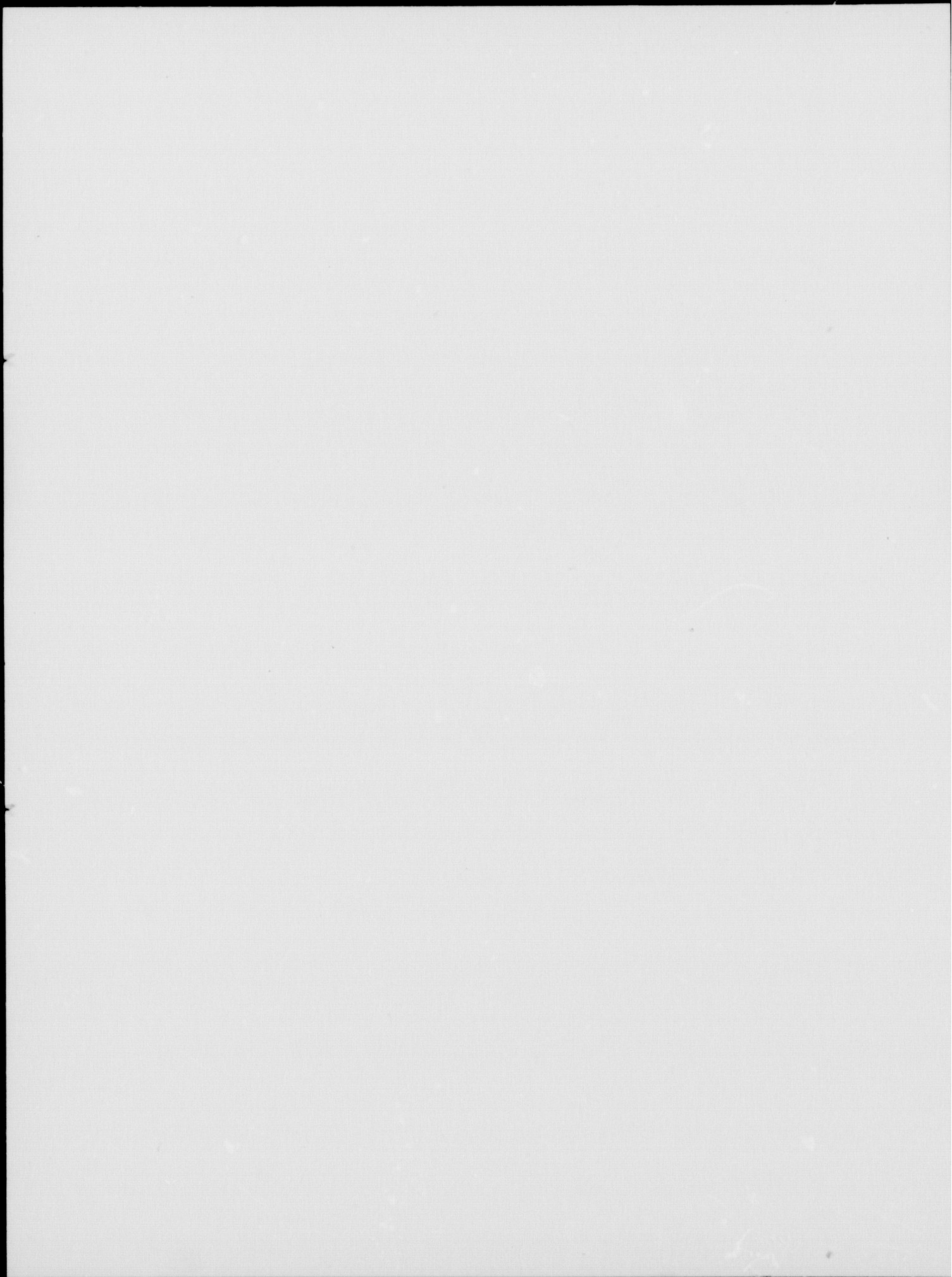
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PRELIMINARY STATEMENT OF FACT

This is an appeal from a judgment on a decision entered the 30th day of October, 1975 in the United States District Court for the Western District of New York, in the case of THOMAS W. EGGERT v THE NORFOLK & WESTERN RAILWAY COMPANY and the ERIE LACKAWANNA RAILWAY COMPANY, Civil 1973-370. The appellant is appealing a decision of the HON. JUDGE JOHN T. ELFVIN, in which Judge Elfvin granted defendant's motion for a directed verdict made at the close of Plaintiff's case.

Judge Elfvin dismissed Plaintiff's cause of action alleging that the Defendant violated the Federal Employer's Liability Act on the grounds that the Plaintiff had failed to show any negligence. At Page 226 of the trial record, lines 14-25* Judge Elfvin did state,

"At the conclusion of the Plaintiff's case, I was at that time bothered a bit about the aspect of a chair, whether or not there was any negligence there, but I finally came to the conclusion in my own mind that there was nothing upon which the jury could determine that there was any negligence in that aspect. Consequently, even under the Federal Employer's Liability Act, which allows a verdict if there is some negligence, there hadn't been a showing of any. So that we have called off the jury, and they are disposed of."

It is from this usurpation of the jury's basic role, to determine questions of fact as they relate to negligence in a Federal Employer's Liability Case, that the appellant is appealing to the Second Circuit, for a reversal of the decision of the district court. Appellant will also develop other basic errors committed by the trial judge which necessitates a reversal of the directed verdict in favor of Defendant, and a retrial of the issues herein, before a jury.

*Note all references are to original pages and lines of trial record reproduced in Appendix A.

FACTS

The Appellant, THOMAS W. EGGERT, an engineer on the Erie Lackawanna Railroad was injured on the 22nd day of June, 1971, while making a switching movement.

Mr. Eggert reported to work on the 21st day of June, 1971 at 10:30 p.m. as an engineer on a Yard job, at Halstead Avenue, Buffalo, New York. Mr. Eggert was a promoted engineer with approximately seventeen years seniority, but on that night assumed the position of fireman and allowed his fireman, Mr. Kendall to operate the engine. The ground crew an extra crew was performing a switching movement in the yard when Mr. Eggert sustained an injury.

At approximately 2:30 a.m. on the 22nd day of June, 1971, Mr. Kendall, while operating Norfolk & Western Engine 2500 informed Mr. Eggert that the ground crew was out of sight and asked him if he could see them. Mr. Kendall was concerned because if the crew is out of sight he must stop the engine. Mr. Eggert was seated in the front seat of the engine on the fireman's side at this time. Ordinarily, Mr. Eggert would have been seated in the rear seat because of the direction they were moving, but because the front seat was defective and would not turn thereby leaving no leg room between the front seat and rear seat, Mr. Eggert was forced to sit in the front seat. At the time of the accident, Mr. Eggert was in the process of moving from the front seat to the back seat, because the front seat would not turn, when the slack ran in, knocked him off balance and threw him back into the defective seat. After Mr. Eggert was knocked back into the defective seat, he glanced off it and into the wall, and from there fell to the floor of the engine striking his knee on an unguarded brake valve. As a result of the accident, Mr. Eggert

suffered a traumatic injury to his knee, which eventually required surgery. Mr. Eggert initially missed approximately six months of work from June 22, 1971 until early January of 1972. Mr. Eggert then worked until June of 1972, at which time, he was hospitalized on June 15, 1972 and operated on for a torn cartilage and other injuries to the left knee. Mr. Eggert was then forced to remain out of work for approximately six more months. He returned to work on January 4, 1973 and worked up until the time of trial. During the years, 1973, 1974 and 1975, Mr. Eggert did experience occasional days off due to his disability. It has been diagnosed by his physician, Dr. Godfrey, that Mr. Eggert has a partial permanent disability of his left knee. Dr. Godfrey also stated at trial, in answer to whether or not Mr. Eggert's injury was caused by or related to his accident of June 22, 1971, he stated,

"The fall that he sustained was a competent producing cause of the fissuring or the tear that was found in the meniscus at a later date, based on his description to me of the fall and the findings." (Page 86, LL 18-23)

After Plaintiff had presented his case which included testimony of the Plaintiff, Mr. Eggert, the reading of the deposition of the fireman, Mr. Kendall and the testimony of the treating physician, Dr. Godfrey, the Defendant's attorney moved for a directed verdict. The court granted the Defendant's motion even though the Defendant offered no proof to rebut Plaintiff's prima facie case, and even though the court knew as it will be shown in this brief, that the Plaintiff had indeed presented factual issues as to Defendant's negligence, which facts were proper issues for the jury to decide in an F.E.L.A. case.

POINT I

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN DISMISSING THE PLAINTIFF'S CASE AT THE CLOSE OF HIS PROOF, BECAUSE THE PLAINTIFF HAD RAISED SUBSTANTIAL ISSUES OF FACT AS TO THE DEFENDANTS' NEGLIGENCE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT, WHICH, AS A MATTER OF LAW, AND LEGISLATIVE INTENT, ARE TO BE DETERMINED BY A JURY AND NOT THE COURT.

The District Court in the case at bar, usurped the basic function of the jury, and in so doing, deprived Plaintiff of one of his most fundamental rights under the American legal system and the Federal Employer's Liability Act, i.e., the right to trial by jury. If Plaintiff would have desired to have the essential factual allegations of his case decided by the Defendants' attorney, and the Judge, prior to submission to a jury, he would have not written on his complaint, "Plaintiff demands trial by jury." A reading of the trial record which will be developed in point two of this brief, will reveal how the Defendants' attorney, an experienced F.E.L.A. Lawyer convinced the District Court Judge who is relatively new to F.E.L.A. litigation to usurp the role of the jury, and decide the crucial issues of fact, as to Defendants negligence without submitting them to a jury.

The courts have held time and time again that there can be no doubt that an injured railroad employee making a claim under the Federal Employer's Liability Act, is to be accorded the right, where he requests it, to present issues of fact, concerning the railroads negligence and its relation to his injuries, to the jury. The courts, both State and Federal, have been unanimous in support of the injured railroad employees legal right to trial by jury. A review of the leading cases, both state and federal, will reveal the tenacity with which the judiciary has protected this right and unhesistantly reversed judges who have usurped it. In the leading case of ROGERS v.

MISSOURI PACIFIC RAILROAD COMPANY, 352 U.S. 500 (1957), the Supreme Court of the United States, Justice Brennan, writing for the majority, commenting on the sufficiency of evidence under the F.E.L.A. stated,

"Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also, with reason, or grounds of probability, attribute the result to other causes, including the employee's contributory negligence." (352 U.S. at 500) (Our emphasis)

Thus, according to the Roger's rule, the factual question to be answered by a jury in a F.E.L.A. action, is whether or not the Railroad's negligence played even the slightest part in the injuries sustained by a plaintiff employee. The United States Court of Appeals for the Fourth Circuit, in the case of PHILLIPS V. CHESAPEAKE AND OHIO RAILWAY COMPANY, 475 F 2d 22, (1973) commenting on the Roger's Rule at 475 F 2d 24 stated,

"The Supreme Court has restricted the power of a trial judge to withdraw a negligence issue under the Act from the jury."

The court, at 475 F 2d 24 speaking through Justice Butzuer, in so ruling, cited that part of the Rogers case, which stated,

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for jury is made out whether or not the evidence allows the jury a choice of other probabilities." (352 U.S. 506)

Following this standard the Fourth Circuit ruled, that because the evidence presented by Phillips presented factual issues for determination by the jury, as to whether the Railroad provided adequate training and as to whether the Railroad promulgated and enforced safety rules, that therefore, the district court's refusal to submit these issues of negligence to the jury, was judicial error and a new trial was in order. (475 F2d 23 at 24)

The Phillips case is very similar to the case at bar in that the railroad raised points of conflicting evidence and the question of Plaintiff's credibility. However, the Fourth Circuit stated at 475 F 2d 22,

"The evidence conflicted on many of the points, and the railroad raised this about the credibility of Phillips testimony. But since fairminded men may differ over the evidence and the inferences that could be justifiably drawn from it, the issue of negligence under the Federal Employer's Liability Act, should have been submitted to the jury. 'To deprive (railroad) workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which congress afforded them.' BAILEY V CENTRAL VERMONT RY. 319 U.S. 350, 354 63 S.Ct. 1062, 1064, 87 LEd. 1444 (1943)." (our emphasis)

It is interesting to note that the District Court Judge in the case at bar initially recognized precisely these same issues of credibility, (p. 209 11 15-21 and P. 217 1 25) and negligence (p. 213 114-25, 214 1-8&11, 215 11 2-14) as factual determinations for the jury. However, he then allowed defendant's counsel to convince him otherwise and

"came to the conclusion in his own mind that there was nothing upon which the jury could determine that there was any negligence in that aspect." (p. 226 11 17-20)

Although defense counsel presented no direct evidence rebutting Plaintiff's claim, and at most, raised questions of Plaintiff's credibility through cross examination, the District Court judge felt it was within his province to take the case from the jury and decide it in favor of Defendant. By so doing the District Court Judge implied that any question of fact as to negligence or as to credibility, was properly determinable by him and not the jury. This is not the law. (cite McBride v. Toledo Terminal Railroad, 354, U.S. 517, Margevich v Chicago & Northwestern Railroad, 348 U.S. 861.

The direct testimony of Plaintiff raises substantial factual questions as to the Defendants' negligence, which by law were properly submittable to a jury.

At page 54 ll 5-16 the Plaintiff testified about the facts leading up to the accident,

"A. Well, Mr. Kendall, (the fireman) asked me if I could see anyone on my side, and I was sitting in a seat that was cocked, the back rest - the whole seat was cocked to the side, and Mr. Kendall is over there in the cab, and so I turned to him to ask him what he wanted, and he said - again he said, 'Can you see anyone on your side?' And I couldn't get around because the seat was cocked, it wouldn't move, so I started to get up to get out of this seat to go into the rear seat so I could sit in that seat side saddle and watch the signal from him and communicate to him face to face. (our emphasis)

At page 55 ll 5-25, the Plaintiff again described the facts concerning the accident,

- "Q. Do you know in what manner this engine was slowed down?
 A. He was throttling down. I could hear the engine throttling down.
 Q. And can you tell the jury what happened next?

A. As I was trying to get up to change from this seat to go into the other seat, I was knocked off balance, and first I went back against the seat, and I tried to catch myself with the seat but I couldn't hold on, and I went from there into the wall, and from there I went down onto the brake valve, which I hit my left knee with and down in a pile on the floor.

Q. Did you say anything to Mr. Kendall at this time?

A. Yes, I think he said to me, 'what happened?' and I said, 'I hurt myself, I hurt my knee.'

Q. Now, Mr. Eggert, can you tell me, do you know what caused you to lose your balance or whatever you did to strike the wall?

A. It was a slack action.

Q. What is that?

A. That is the action of the cars coming in or out

and Mr. Eggert's answer continued at p. 56 ll, 1-5

This case in, coming in, the slack between the drawheads or the couplers of each car, there is some slack and when these come in and you have a number of cars, as they come in you get the force of the whole slack action."

Concerning the seat which Plaintiff testified was defective, thereby causing him to sit in the front seat rather than the back, which the railroad offered no evidence to controvert, Plaintiff stated at page 100, ll 10 to 16,

"Q. Mr. Eggert, can you tell me the position of the front seat in that Norfolk & Western engine as it was on the night of June 21, 1971?

A. Well, it was about eight to ten inches off center.

Q. Can you tell me what you mean by "off center"?

A. It was turned to the left."

And further, at page 101, ll 25:

"Q. Mr. Eggert, did you attempt to sit in the rear seat?

A. Yes, I did."

And at page 102 11 1-7:

"Q. And were you able to sit in the rear seat?

A. I was able to sit in it but I had no leg room.

Q. Okay, When you say you usually sit in this rear seat, what do you do to make leg room, if anything?

A. I turn the seat around.

Q. Which seat is this?

A. The front seat."

And at page 102, 11 12-19:

"Q. Okay. And have you been able to turn these seats around in the past?

A. Yes.

Q. And how do these seats operate when you turn them around?

A. They swivel.

Q. What do you do to make it swivel?

A. Just turn it, take a hold of it and turn it."

And at page 102, Line 25:

"Q. Did you attempt to turn this front seat in

and at page 103, 11 1-6:

the Norfolk & Western 2500 engine.

A. Yes.

Q. What happened when you made your attempt to turn it?

A. It wouldn't turn.

Q. Which seat did you eventually sit in that evening?

A. The front seat.

The reasonable inferences that a jury could draw from Mr. Eggert's testimony are: (1) That he went to work on June 22, 1971;

(2) That he was working on Norfolk & Western Railroad engine 2500, which at that time had a defective front seat that would not turn; (3) that because of the defective seat, Mr. Eggert was forced to sit in the front seat rather than the back seat; (4) that at approximately 2:30 a.m., the ground crew went out of sight while a switching move was being made; (5) that Mr. Kendall working as engineer asked Mr. Eggert if he could see the ground crew; (6) that because the seat Mr. Eggert was sitting in would not turn, he had to get up to look out; (7) that as he was getting up, the slack ran in with some force; (8) That the force jolted him and threw him backward into the cocked seat; (9) that Mr. Eggert then bounced off the seat into the wall of the engine and fell to the floor striking his knee on the unguarded brake valve. The above factual situation testified to by Mr. Eggert is entirely believable. The railroad offered no direct testimony to rebut Plaintiff's testimony and indeed merely raised factual questions of credibility through cross examination. The court by resolving the factual issues as to the alleged negligence on the part of the railroad in providing an engine with a defective seat, in causing the slack to run in at a jolting speed and in providing Plaintiff with an engine with an unguarded brake valve; and by deciding the issue of credibility as to the Plaintiff's version of the accident without requiring the Defendant to put in proof or without letting the factual issues go to a jury thereby exceeded its role and effectively denied Plaintiff his legal right to trial by jury.

Although the court felt that the question of the defective seat was the only issue in the case, the Plaintiff did raise the additional issues in the pleadings and evidence at trial of a jolting

slack action and an unguarded brake valve, which also could have contributed in some way, no matter how slight, to the Plaintiff's injuries. It does not matter that the District Court Judge felt that conflicting inferences from the set of facts presented were feasible. The District Court Judge had no more knowledge or expertise in the area of defective engine seats, jolting slack action and unguarded brake valves than the jurors themselves. It was their role to decide the factual issues, as to whether or not these factors were present in Plaintiff's case and as to whether or not they caused the injuries complained of. The court's usurpation of the jury's role in this case, necessitates a reversal of its decision and a new trial for Plaintiff.

POINT II

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE ATTORNEY FOR THE RAILROAD TO DRAW THE INFERENCES AND CONCLUSIONS AS TO WHETHER OR NOT ANY NEGLIGENCE EXISTED ON THE PART OF THE RAILROAD, AND THEN ADOPTING THEM FOR THE COURT'S FINDINGS.

A reading of the court discussion between District Judge and the Attorney for the Railroad, reported at pp. 208-220 of the trial record will reveal that indeed the Judge allowed Defendant's counsel to talk him out of what the judge felt were issues for the jury. After listening to Defendant's counsel, the court took the motion to dismiss under advisement and advised the parties about two and one half hours later, via telephone, that Defendant's motion was granted. A review of the trial testimony indicates that the District Court Judge initially had substantial well founded reservations about granting Defendant's motion to dismiss. At page 209, ll 15-21, in response to defendant's motion for a directed verdict for failure of proof the court stated:

"Now, you are getting into a phase - I know that this is in the case very much, but you are getting into an area of credibility that the jury's got to decide. You have got to take really the most that he said, regardless of when he said it, as far as the evidence before me."

Defense counsel continued to urge the court at page 209, 1122-25;

"Mr. Griffin - what I was getting to, your Honor, was that he started out -

The Court - I understand.

Mr. Griffin - with a claim, and continued and progressed a claim of sitting in a seat and turning, and now he has withdrawn that. That is the point that I make. He expressly

The Court: - That is a question for the jury.

Mr. Griffin - Well, no, I disagree."

At this point, the Court rightfully delineates the role of the Court and the role of the jury. However, defense counsel remains insistent and urges the court further alleging that the Plaintiff has changed his claim through his own testimony. The Court states at page 211, 11 12 and 13:

"My job is not to say what a jury will do, but what a jury can be permitted to do."

In an F.E.L.A. case, the question of whether or not the Plaintiff is changing his story, as alleged by the Defendant's counsel in argument and not rebutted by direct evidence or testimony of defense witnesses and emphatically denied by Plaintiff himself, becomes a question of fact and credibility for the jury. The weight of the evidence and the credibility must be left to the jury.

Shiffler v P.R.R., 176, F 2d 268 (Ca 3rd 1949); Railway Mail Ass'n v Chamberlain, 148 F 2d 206 (CCA 8, 1945). As early as 1888, in the case of Jones v East TennesseeV&G Railroad Company, 128 US 443, 445, 9 St. Ct. 118, 32 L.Ed. 478, Justice Miller declared;

"We see no reason, so long as the jury system is the law of the land, (referring to the Seventh Amendment) and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

(For a discussion of the role of the jury see 12 Federal Rules Decisions, 13, 57). In the case at bar, defense counsel convinced the Court, albeit in error, to perform the jury function.

At page 212 of the trial testimony, defense counsel indicates to the court that the railroad is prejudiced because the Plaintiff is claiming slack action jolted him and caused him to fall and that this was not in the first interrogatories. However, this claim was made by

Plaintiff at the E.B.T. in March of 1975 and the trial was not held until October of 1975. The Defense Counsel at page 212, 12-15 insinuates that there was no reason to interrogate fireman Kendall on the slack action because fireman Kendall was questioned before the Plaintiff, and Plaintiff had not mentioned slack action earlier. However, fireman Kendall was in Defendant's employment from March of 1975 up to and including October of 1975, the date of trial, and, therefore, could have been further questioned by Defendants or produced by Defendants at trial to rebutt Plaintiff's testimony. The court at page 212, 11 16-18 says that the Plaintiff stated that there was no unusual or unexpected movement and nothing wrong with the speed. However, the Plaintiff did not testify exactly to these facts and indeed testified that he was jolted and thrown around, thereby injuring his knee. It is the jury's province in light of Plaintiff's testimony and not the courts or defense counsel's to draw inferences as to whether or not getting knocked around the cab of an engine and injuring a knee is not an unusual movement. At page 213, 11 4-25 the Court limits the Plaintiff's case even further and says to defense counsel the question of whether or not it is reasonably expected that the emergency valves should have guards, is not in the case and "the only thing I want you to deal with is the question of the seat." (Page 203 at 11 13-16) Although the Court at page 214 11 1-7 does indicate the possibility of the seat being defective, and states at page 214 line 11,

"I am saying the jury can accept that."

Defense counsel argues otherwise and again convinces the Court that defense counsel is capable of making the jury's factual determinations for the court.

At page 214 ll 12-25, Mr. Griffin states to the Court,

"The presence of the seat or anything in that cab is a mere coincidence to an occurrence. It is not in any respect a cause of the occurrence that he seeks to recover for."

At page 215 ll 8-14, the Court in response to defense counsel allegation that the seat was a "mere coincidence to an occurrence" retorts at line 8,

"All he says is wrong is being thrown down, the angle of the seat cocked to the left and threw him to the left against the emergency valve. All he is saying is that there is something wrong with the seat because he couldn't turn the seat."

To the Court's latest effort to preserve the case for the jury, Mr. Griffin replies at page 215, ll 15-16,

"That's got nothing to do with the accident."

Mr. Griffin staunchly insists that there is no negligence in the case and the Court in its last effort, before ruling with Mr. Griffin states at page 217, line 25,

"Here is a question of believability, which is not my chore."

Mr. Griffin relentlessly presses further and the court in total retreat, asks defense counsel at page 220 ll 15-17.,

"Is there anything in the case that would show any negligence on the part of either railroad in the non-functioning of the seat?"

Here the court is engaging in the type of deliberation that is properly for the jury to consider. In response to the Court's inquiry, as to negligence, defense counsel at page 220, ll 19-25 responds,

"Absolutely not, your Honor, That has nothing to do with it. At best, the position of the seat came to his aid."

It is quite evident from the Court's discussion of the facts

surrounding the accident, that substantial questions of fact, relating to the Defendant's negligence, did exist in the Court's mind.

It is very probable that these similar questions existed in the jury's mind and that had they been allowed to fulfill their role, that they might have found in the Plaintiff's favor. By denying the jury its proper function, the court and defense counsel engaged in the type of mental process, which the United States Supreme Court in the case of Gallick v Baltimore and Ohio Railroad, 372 US 108, 9 L.Ed. 2d 618 succinctly stated was within the province of the jury. In speaking for the United States Supreme Court, Justice White stated at 9L Ed 2d 624,

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain references. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusions to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable, Washington & Georgetown Railroad Company v McDade, 135 US 554, 571, 572; Tiller v Atlantic Coast Line Railway Co., Supra 68; Bailey v Central Vermont Railway Co., 319 U.S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

POINT III

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO ALLOW THE PLAINTIFF THE OPPORTUNITY TO PRESENT EVIDENCE OF OTHER TYPES OF YARD ENGINES AND GUARDED BRAKE VALVES USED BY THE DEFENDANT RAILROAD.

The Plaintiff in his answer to Interrogatories 5, 6 and 7 asked by Defendant, Erie Lackawanna Railroad answered in response to questions about the negligence of the Defendant, that; (Appendix C),

- (5) "Among other things, the Defendant, Erie Lackawanna Railway Company, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do..."

and

- (6) "The Defendant, Erie Lackawanna Railway Company, failed to properly maintain the seats in the said locomotive and also failed to provide a guard or safety device over the emergency brake valve;"

and

- (7) "Seats of the locomotive cab did not swivel or turn as they should have and the pipes and the valve and handle of the emergency air brake valve protruded out..."

The Plaintiff answered the interrogatories of the Defendant, Norfolk and Western, with approximately the same answers. In both cases, the interrogatories stated that the Plaintiff struck his knee on an unguarded emergency brake valve as he was attempting to move in the locomotive. At trial, Plaintiff attempted to offer testimony to prove his allegations and also attempted to offer evidence to show that the railroad failed to provide him with safe equipment and a safe place to work.

Plaintiff attempted to introduce pictures and testimony concerning other engines used by the Defendants, which were equipped with brake guards in order that the jury might have some evidentiary

basis for comparison and for determining whether or not the Defendant used due care under the circumstances. At page 113, 11 7-14, Plaintiff's counsel asked Plaintiff,

"Q. Have you worked on engines that had a fireman's brake valve set up different from this one?

A. Yes."

Defense counsel then objected at 11 10-13 to this line of questioning:

"Mr. Griffin - I object, if the court please. It is outside the scope of this case. He was on a particular type of locomotive at the time.

The Court - I won't allow any further inquiry."

The court by ending the Plaintiff's attempt to show that indeed the Defendant railroad does have brake valve guards on other engines committed prejudicial error. In numerous cases, the courts have ruled that evidence of failure to provide a proper type of safety equipment is properly receivable and presents a question of fact for the jury, where it is alleged, as in the case at bar, that this lack of safety equipment is causally related to the accident. In Ferrara v Boston & Maine Railroad Company, 338 Mass. 323, the Court ruled that evidence that the railroad failed to use reasonable care to provide and enforce the use of proper safety equipment, even though slight in nature, was sufficient to allow the case to go to the jury, as to the issue of the railroad's negligence. Santaro v Long Island Railway Company, 148 F Sup. 594, (1957); Snyder v Lehigh Valley Railway Company, 245 F 2d 112 (1957 CA 3); Young v Clinchfield Railway Company, 228 F 2d 499 (1961 CA 4) and Sodowski v Long Island Railroad Company, 292 NY 448, are all cases that hold that the question of whether or not a railroad is liable for not providing the proper type of safety

devices, raises a question of fact for jury determination. In the case at bar, the Court refused to allow Plaintiff to testify from his own knowledge about guarded brake valves on other engines and refused to allow Plaintiff to offer pictures of other engines that were owned by the Defendants and equipped with brake valves with guards. The Plaintiff offered this testimony and these pictures to help give the jury some basis for determining whether or not the Defendant used due care in providing Plaintiff safe equipment and a safe place to work. By denying Plaintiff the opportunity to offer evidence to the jury that would help clarify the issues before the jury and at the same time give them some basis for determining whether or not engine #2500 was unsafe as opposed to other engines that Defendants could have assigned to Plaintiff, the Court committed reversible error.

Likewise, the Court precluded Plaintiff from offering testimony as to the type of engine which would have been better suited for yard service. Plaintiff claimed in his answer to interrogatories that the Defendants failed to provide the proper type of yard switching engine. Yet, when Plaintiff attempted to develop at trial that a yard switcher has better visibility because of larger windows and thus obviates the need to swivel around and change seats in order to see the ground crew, the Court at Defendants insistence, cut Plaintiff off. The Court stated at p. 49, ll 4-10 that it did not see any relevance between the size of the windows on the various engines and Plaintiff's case. Had the court allowed the Plaintiff to present the case, as he pleaded it, and not precluded him from offering evidence as to whether or not the Norfolk & Western engine #2500 was unsafe in that it was a Road Yard engine and lacked good cab visibility, thus necessitating people movements within the cab, and secondly that Norfolk & Western

Engine #2500 was unsafe because it lacked proper type of brake valve guards, the Plaintiff could have established jury questions of facts as to whether or not Defendant provided Plaintiff with safe equipment and a safe place to work.

Again, the Court by limiting Plaintiff's introduction of factually relevant data prevented the Plaintiff from proving essential parts of his lawsuit and thereby, through judicial action denied the Plaintiff his Constitutional Right under the Seventh Amendment, and his Congressional Right under 45 USC 52 et al, to have a jury of his peers decide the essential factual questions concerning his case, as to whether or not the Defendant, Railroad was negligent in not providing him a safe place to work and as to whether or not this negligence played any part, no matter how slight, in the injuries that Plaintiff suffered, Webb v Illinois C.R. Company, 352 US 512, 1 L Ed 2d 503 (1957).

CONCLUSION

The District Court committed reversible error and unduly prejudiced Plaintiff's right to trial by jury guaranteed by the Seventh Amendment and the Federal Employer's Liability Act. Because the District Court usurped the function of the jury, and in error assumed the role of the jury as interpreter of the facts, the decision of the District Court duly entered in this case of the 30th day of October, 1975, must be reversed and a new trial granted.

Respectfully,

John F. Collins
JOHN F. COLLINS

APPENDIX.

1a
PROCEEDINGS, dated 10-29-75.

6

* * * * *

1 PROCEEDINGS OF OCTOBER 29, 1975, COMMENCING AT 9:00 A.M.

2
3 (Plaintiff's Exhibits 1 through 14 were
4 remarked for identification.)
5 (Jury present, counsel present.)
6

7 THE COURT: All right, ladies and gentlemen, we
8 are ready to commence the trial of Thomas
9 W. Eggert versus the Norfolk & Western Railway
10 Company and the Erie Lackawanna Railroad.
11 Those of you who have participated in trials
12 know that we proceed in an orderly fashion,
13 hopefully. Initially, the attorneys represent-
14 ing the respective sides have the duty and
15 the right to tell you what they expect is
16 going to be proved by the evidence. Each
17 one will tell you what he expects will be
18 proved, and the purpose of that is not to
19 give you evidence, nothing the attorneys
20 say is evidence, but merely to provide you
21 with a framework of reference within which
22 you can place the little bits of evidence
23 as they come in word by word and document
24 by document, so you can get some relation-
25 ship among the various pieces of evidence.



1 Then after that we will commence the taking
2 of the testimony with the plaintiff proceed-
3 ing first and the defendant secondarily, and
4 following that the attorneys will again have
5 an opportunity to speak to you, at this time
6 by way of arguing, by way of telling you
7 what they think by that time has been proved
8 by the evidence. Following that I will tell
9 you what the governing law is, and then you
10 will retire and decide the case. We are at
11 the point of the opening statements. Mr.
12 Semple, on behalf of the plaintiff, will
13 make his opening statement.

14 MR. SEMPLE: May it please the Court, fellow counsel,
15 ladies and gentlemen of the jury: At this
16 point in the lawsuit I am going to give you
17 an opportunity to meet my client, Mr. Thomas
18 Eggert. What I am basically going to do now
19 is give you an idea of what I intend to
20 prove and what I intend to show as to how
21 the accident happened, what the results of
22 the accident were and, basically, Mr. Eggert's
23 present condition.

24 Mr. Eggert at the time of the accident,
25 which took place on June 22, 1971, was in

1 the employ of the Erie Lackawanna Railway
2 Company. On the night of the accident he
3 reported for duty, that would be June 21st
4 at ten-thirty. Where he reported is a yard
5 known as the Bison Yard. At the time of
6 his accident the yard was being worked
7 jointly by the Erie Lackawanna and the
8 Norfolk & Western, and that is how the
9 Norfolk & Western happens to come in here.
10 On the night of the accident Mr. Eggert
11 was using an engine owned by the Norfolk &
12 Western Railway Company even though he was
13 in the employ of the Erie Lackawanna. At
14 times he uses an Erie Lackawanna engine
15 obviously, there is no question about that,
16 but on this evening it was a N & W engine,
17 Engine Number 2500.

18
19 At this particular time Mr. Eggert
20 was working not as a regular man, reporting
21 for work every Monday, Tuesday, Wednesday,
22 Thursday and Friday, at a regular time, you
23 know where you are going to go, he is working
24 off what is known on the railroad as a list.
25 He is called, he is subject to call twenty-
four hours a day, seven days a week, and

1 on this night he received this call and
2 reported for duty at ten-thirty. At the
3 time, until he reported for duty, he didn't
4 know who his crew was. You meet them at
5 the yard office in the Bison Yard. Every-
6 body gets together, 'Who is working the
7 utility job?' This is the job he was
8 working. You meet your conductor and your
9 two brakemen, who are known as the ground
10 crew. He met his fireman. Mr. Eggert on
11 this particular evening was the engineer
12 on the job.

13 Now, the ground crew, the conductor
14 and the two brakemen don't know too much
15 about this accident, I don't think they do.
16 Number one, they were not -- the accident
17 took place, as you may know or have inferred,
18 in the cab of this particular engine. The
19 only people that we know who were in the
20 cab at the time was Mr. Eggert and his
21 fireman, Mr. William Kendall. Sometime
22 back in March of 1975 we took testimony.
23 I didn't take it, Mr. Lankes, he is my
24 associate, took the testimony. Mr. Griffin
25 was there. This was sworn to, and nothing

1 that is going to be said in the trial is
2 going to be a real surprise. Mr. Griffin
3 knows what Mr. Eggert is going to say. I
4 don't know if he is going to bring in Mr.
5 Kendall, but I'm not. I am going to read
6 his testimony. Mr. Eggert you will hear
7 from the stand.

8 The first thing that Mr. Eggert did
9 after reporting to the office was to go and
10 find the particular engine that he was to
11 work with. As is the usual custom and
12 practice, he takes a walk around the engine
13 to check the various safety appliances;
14 grab handles, air, any other type of thing
15 regarding the safety of this particular
16 engine. When he finished that he went up
17 into the cab. This particular engine is
18 known as a road switcher.

19 Now, at times, and Mr. Eggert I think
20 can tell you a little more about it, he
21 works also on what is known as a yard switcher.
22 There is a difference in these two types of
23 engines, a difference in the way they are
24 constructed. The road switcher has got a
25 short end in front of it. You've got the

1 short end, you've got a cab, and then you've
2 got all the power behind it, the long part
3 of the engine. The yard engine is just the
4 other way around. You've got the long part
5 in front, all the power, then the cab, and
6 then there is a little landing for the other
7 members of the crew to stand on, if they
8 wish to stand on it.

9 On this particular night he was working
10 the yard switcher -- or the road switcher,
11 excuse me -- and I think he is going to tell
12 you that this road switcher is not particular-
13 ly suited, as far as he is concerned anyway,
14 for switching in a yard. He is going to
15 tell you why.

16 Mr. Kendall is also what is known as
17 a qualified engineer. He can run the engine
18 just as well as Mr. Eggert can.

19 On this particular night Kendall,
20 according to what he and Mr. Eggert discussed,
21 was going to run the engine the first part
22 of the evening. I guess what they usually
23 do is one guy will run it before lunch, the
24 next guy runs it after lunch. Well, this
25 time Mr. Kendall had the engine. They made

1 various moves, switching cars throughout
2 the yard, prior to the time of this accident.
3 Mr. Kendal doesn't remember what the exact
4 moves they made were. Mr. Eggert doesn't
5 remember what the exact moves were. They
6 do know that they were moving basically in
7 an east and west direction. That is basically
8 the way the tracks run in that yard.

9 Mr. Eggert got up on this engine to
10 assume his duties as a fireman. He's got
11 to sit in a seat. There's two seats in
12 this engine on the fireman's side, this
13 would be the left side of the engine as you
14 are facing the front, one directly behind
15 the other. It has been Mr. Eggert's prefer-
16 ence, as he will testify, that he usually
17 sits in the back seat. On this particular
18 evening he went to sit down in the back
19 seat, and he did, he tried it, but when he
20 usually sits in the back seat he will turn
21 the front seat either to the side or turn
22 it around so that the backrest and the
23 tubes on the backrest -- I think you will
24 see these in some pictures -- don't inter-
25 fere with, you know, the free movement of

1 his body and his knees. When he tried to
2 move this front seat around the night of
3 June 21, 1971, the seat wouldn't move, it
4 wouldn't budge. He tried to move it but it
5 wouldn't go. As a result, he really didn't
6 have too much room in the back seat so he
7 sits in the front, and this is the way that
8 he is operating in this engine on the fireman's
9 side up to the time of the accident. As I
10 say, we don't know what the moves were prior
11 to the accident, other than they were basically
12 back and forth, east and west, from ten-thirty
13 until two-thirty, which was the time of the
14 accident.

15 Prior to this accident happening, Mr.
16 Kendall asked Mr. Eggert if he could see
17 the ground crew. Again, the ground crew
18 is the conductor and the two brakemen, and
19 these are the people, the ground crew, who
20 direct what the engineer is going to do,
21 and they do this by signals. Ten-thirty
22 in the evening, it was dark, and when it is
23 dark the ground crew uses lamps, railroad
24 lamps, and they've got various movements
25 of the lamps that signify what the engineer

1 is supposed to do; stop, slow down, come
2 ahead, back up, that sort of thing, and
3 without these signals that engine doesn't
4 move. The engineer and the fireman will
5 not move the engine unless they receive
6 signal from that ground crew. This is how
7 they were operating the whole evening prior
8 to the accident. Just prior to the accident
9 Mr. Kendall turns to Mr. Eggert and he asks
10 him, 'Do you see the ground crew? I can't
11 see them.' They are out of his sight.
12 Now, I think it is custom and practice, and
13 Mr. Eggert will tell you that when you don't
14 see a signal, you don't see a man, you don't
15 see a lamp, the railroad stops, you don't
16 move. As I said, you don't move without
17 that signal. So in response to Mr. Kendall's
18 request to look for his fellow workers, Mr.
19 Eggert has got to make a move, he's got to
20 get up, got to turn in his seat so that he
21 can pass signals to the engineer. Now, they
22 may do this verbally at times, they may do
23 it by their own hand signals within the
24 engine. On this evening it will be testified
25 to that the cab was dark. He turns, attempts

1 to get up from his seat. As he gets up
2 from his seat -- I told you when you don't
3 see the ground crew you are supposed to
4 stop, and I think this is what the engineer --
5 this fireman, Mr. Kendall, who was operating
6 the engine, was doing, slowing down his
7 train, got a throttle on it, and he also
8 has what is known as an independent brake,
9 the independent brake operates only the
10 brakes on this engine. There is another
11 brake, if they put air in the cars, that
12 will stop the cars all the way down the
13 line. There is no air in the train, it is
14 just the brakes. Now, as Mr. Eggert was
15 getting up and as this train was either
16 slowing down or stopping, slowing down in
17 speed let's say from seven to eight down to
18 four to five, which I think is the testimony
19 as to what the basic speed was at the time
20 of the accident, and you've got a string of
21 cars behind you. Nobody -- I don't think
22 anybody knows the number of cars that we
23 had. They don't know whether they were
24 loaded or empty. But we've got a string
25 back there, and these cars are all hooked

1 together with couplers. When you think
2 about it, if the train was pulling, which
3 is what was happening just before this
4 accident happened, pulling in a westerly
5 direction, all these couplers are tight, one
6 against the other, all down the line. If
7 you apply a brake or slow down the front
8 of the train, everything starts moving in,
9 all the box cars are moving in, one against
10 the other, and that's what happened this
11 night. They call it slack run-in.

12 MR. GRIFFIN: May it please the Court, I am reluctant
13 to interrupt anyone in their opening state-
14 ment, but we would object to any evidence
15 being introduced on this trial under any
16 claim that a movement of the train, such
17 as a jerk or anything, had anything to do
18 with this accident, in that it was never
19 claimed in this case. The answers to
20 interrogatories under specifications of how
21 this accident happened or what respect we
22 are claimed to be at fault make no mention
23 whatsoever of any movement of the train in
24 any respect. We would object to that. I
25 don't want to be in a position to waive that

1 by sitting silent here.

2 MR. SEMPLE: Your Honor, if I might speak to Mr.
3 Griffin's objection. As Mr. Griffin mention-
4 ed earlier in the case, these interrogatories,
5 which were answered by Mr. Eggert on January
6 30, I believe, 1974, were prepared by Mr.
7 Eggert's prior attorneys, Weber & Weston.

8 THE COURT: Still prepared by and for him though.

9 MR. SEMPLE: Yes, however, the statement in there
10 does say that he attempted to arise from
11 his seat, I believe, in the answers to
12 interrogatories. I have to say that it
13 doesn't say anything about slack action.
14 However, this did come to light at such
15 time as Mr. Eggert came to our office, and
16 upon further questioning from Mr. Lankes,
17 who, as the Court knows, is very knowledgable
18 in the railroad field, as I don't believe
19 Weber & Weston are, it came out.

20 THE COURT: I won't accept that classification of
21 counsel, they are all good counsel. The
22 point is when, if at any time, was the
23 defendant or were defendants apprised of
24 this theory of the plaintiff's case?

25 MR. SEMPLE: Your Honor, I believe it will show

1 in the testimony that it was the day of the
2 deposition, March 11, 1975, Mr. Griffin was
3 apprised of the fact there was some unusual
4 movement which contributed to this accident
5 and I think --

6 THE COURT: Where in that do you find it?

7 MR. SEMPLE: I believe Page 100, your Honor, and
8 following. Page 100, Line 1 to Line 8,
9 and following questions on the next two or
10 three pages refer to this unusual movement
11 of the train.

12 THE COURT: All right. I will allow that. Go
13 ahead.

14 MR. SEMPLE: Thank you. As I was saying, we had
15 this slack action that came in, and when it
16 hit the engine it so happened that it happened
17 at the same time that he's getting out of his
18 seat. As it hits it knocks him over, he
19 loses his balance, it knocks him up against
20 the bulkhead of the engine and he strikes
21 his knee on what we believe was the emergency
22 brake valve on this engine. You will see
23 pictures as to where that brake valve was
24 located. We are also going to show you from
25 Mr. Eggert's testimony that that brake valve

1 didn't have any type of guard on it. By
2 that I mean some bar or protection to keep
3 one from striking the valve unexpectedly or
4 accidentally, as the case may be. You will
5 see pictures of that. You will see pictures
6 of one unguarded, you will see pictures of
7 one that is guarded. When this happened
8 Mr. Eggert struck this thing with some force,
9 as he will testify to, down on his knee.
10 He never saw the railroad men. Apparently
11 Mr. Kendall did pick him up, and the move
12 continued in an easterly direction. That
13 was the move, they were pulling west, they
14 were going to make a switch, the ground crew
15 throws a switch and backs the string of cars
16 into another track.

17 After the accident Mr. Eggert did con-
18 tinue to work in some pain and saw Dr.
19 Samuel Militello, the company doctor, the
20 railroad doctor, I believe the same day
21 of the accident. Dr. Militello sent him
22 to the Emergency Hospital for x-rays. The
23 x-rays proved to be negative for any bony
24 abnormality. I believe he went back to see
25 Dr. Militello and Dr. Militello says, 'Well,

1 you are okay to go back to work,' and the
2 man feeling pain in his knee said, 'I can't,
3 I want to talk to another doctor,' and this
4 is what he did. He went over to the Godfrey
5 orthopedic group because he had occasion to
6 see them earlier in his life when he had
7 a prior accident some time back in 1953,
8 somewhere in that area -- don't hold me to
9 that date because I don't remember -- some
10 time in the early fifties. Dr. Godfrey
11 treated him for, I believe, a fracture of
12 the spine or something like that arising
13 out of an automobile accident. Dr. Curtin
14 examined him on June 26th, and, you know,
15 Mr. Eggert told him how his knee felt, and
16 he told him to stay off from work, and this
17 is what he did. He continued to see Dr.
18 Curtin or Dr. Lies or some other doctor
19 in the orthopedic group up until the time
20 that he returned to work in January, in the
21 early part of January of 1972, which is
22 approximately at that point six months off
23 of work.

24 Now, Mr. Eggert got back to work,
25 continued to have problems with his knee.

1 He was eventually sent to the hospital to
2 have an arthrogram, this is by Dr. Godfrey's
3 office. If you are not familiar with an
4 arthrogram, they will inject a dye into the
5 cartilage of your knee so that they can tell
6 what it is. You can't tell cartilage on
7 an x-ray from what I understand. I'm not
8 a doctor, but that is what I understand.

9 / As a result of this test, Dr. Godfrey
10 performed an operation on Mr. Eggert on
11 June 15, 1972. They opened up the knee,
12 they opened up the knee joint, shaved away
13 some cartilage of the kneecap, and I believe
14 took out a piece of cartilage known as the
15 medial meniscus. Mr. Eggert was in the
16 hospital for some time, twelve days, after
17 that surgery and was off work again until
18 approximately January 4, 1973. That is
19 approximately again another five to six
20 months. From then he has worked on the
21 railroad. He has lost a considerable amount
22 of time in each year following his return
23 to work in the early part of 1973, as a
24 result of the knee, as he will testify to.
25 It still bothers him. It is bothering him

1 today. According to calculations that Mr.
2 Eggert has made, he lost somewhere in the
3 area, as a result of this accident, of
4 around \$25,000 in lost wages. There may
5 be a dispute as to that, I don't know. I
6 don't know what the railroad's records are,
7 but that is the case.

8 He is working now and he is going to
9 continue to work, I'm sure, the best he can,
10 but the knee does still bother him.

11 You are going to hear Dr. Godfrey, I
12 hope, testify as to what his medical injuries
13 are, or Dr. Curtin, whichever one is avail-
14 able. There are going into a more detailed
15 explanation about the history and what was
16 wrong with the knee throughout the course
17 of this two year period -- or one year
18 period prior to the surgery.

19 What I ask you to do is to pay close
20 attention to the testimony in the trial,
21 both Mr. Eggert and any witnesses that I
22 may present, and also Mr. Griffin's witnesses,
23 whomever he may present, and look at it with
24 an open mind. Don't make any decision after
25 you hear Mr. Eggert, don't make any decision

1 after you hear whatever doctor testifies,
2 and I think Mr. Griffin will ask you for
3 the same thing because that is what he wants,
4 that is what we all want you to do, wait
5 until the end, and while you are listening
6 to this I want you to ask yourselves when
7 you hear the testimony whether or not in
8 this particular situation the railroad offered
9 Mr. Eggert a safe place to work.

10 I am not going into anymore than that.
11 I just want you to think about that. Again,
12 I am going to ask for your attention. I
13 thank you for the attention you have given
14 me this morning. I thank you very much.

15 MR. GRIFFIN: May it please the Court, Mr. Semple,
16 ladies and gentlemen, good morning. I am
17 not going to say much at this point because
18 there is no evidence before you. After the
19 evidence is in and we have heard what the
20 witnesses have to say as to these allegations,
21 then I will have a chance to talk to you in
22 great detail, to argue why we think this is
23 not a credible claim, and why we feel it
24 should be rejected.

25 Apparently, Mr. Eggert over the years

1 off an on has had some problems with his
2 knees. He had other physical problems and
3 he wasn't working perhaps one hundred percent
4 in the years 1970 and so on, you will find
5 that his gross earnings were in the nine
6 thousand range in the 1970's. Since he has
7 had the surgery on his knee back in the year
8 '73-'74, he is up in the fourteen, fifteen
9 thousand dollar earning range.

10 Apparently he complained on June 22nd
11 when he was working about his knee. He made
12 a claim to his superiors that he turned in
13 his seat and bumped his knee, and they sent
14 him over to railroad doctor, and the doctor
15 checked it out and said, 'Well, you've got
16 some degeneration in your knee, crepitation,
17 and things of that nature, but you should
18 be able to work.' He chose to stay off and
19 treat it for a year off and on with the
20 orthopedic surgeons who eventually operated
21 on him for a degenerative condition in the
22 knee area.

23 Now the reports that we have where
24 this gentleman made his claim, he said to
25 two or three people, he said to the doctor,

1 because the doctor said, 'What happened,
2 describe what occurred', and the trainmaster,
3 as the engineer in charge of the engine, if
4 he claims an accident he is supposed to make
5 out a report, and when he made out the
6 report he said, 'I was turning in my seat
7 and struck my knee against this brake valve.'
8 He went to some lawyers by the name of Weber
9 & Weston, and they filed papers in the case
10 and said that 'we are blaming the railroad
11 because you had a brake valve located in an
12 improper place, and the seat didn't swivel
13 and when the man was turning in the seat
14 he hit himself,' and that was the claim up
15 until a few months ago, and that was the
16 claim as filed in court. There was another
17 series of lawyers in between Weber & Weston,
18 some out of town counsel which name escapes
19 me at the moment but we will develop that,
20 and the case was progressed here. Then we
21 eventually served a notice, as we have a
22 right to, to take the testimony before trial,
23 we have what we call a pretrial examination,
24 and apparently it was figured out in the
25 plaintiff's mind, which is all that I can

1 imagine, that because of the particular
2 location of where this brake valve is, its
3 height, its location in this engine, there
4 is no way that a man turning in his seat
5 could have hit his knee. So we now have
6 a different version where the man is claiming
7 that he was standing up in the cab and some-
8 how he was thrown off balance or something,
9 he claims there was a slack movement or
10 something of that nature, that is what you
11 heard today. Well, we say that this is just
12 not credible, and this is the history of the
13 claim that we have had here. He said, for
14 example, he said in the papers, the evidence
15 will show, that there was a brakeman who was
16 not on the ground, he was up in the cab in
17 one sworn version. Now he says the only
18 person in the cab with him was the fireman
19 who happened to be operating the engine.
20 There is many, many, a host of inconsistencies
21 here that we will develop. I ask you to
22 bear with us as we develop those, because
23 it is our position that this was a normal
24 engine, in good condition, no defects. The
25 persons who had used it didn't complain.

1 This person who was in charge of this engine
2 made no complaint about this engine or
3 asked for repairs before he took it out.
4 There is an emergency brake valve that is
5 located on it, and that is on the fireman's
6 side, so that if there is any problem he
7 can stop the engine right away if they are
8 running. Each side there is an emergency
9 brake, normal equipment, and it had the two
10 seats in it, and it was operating in a
11 normal switching movement that this man had
12 been involved in hundreds of times in his
13 fifteen or more years of work on the rail-
14 road.

15 'We don't see how we are responsible
16 at all for this particular claim here and
17 we resist it. As I say, at the close of
18 all of the evidence we have summations.
19 Those of who who have sat as jurors before
20 know we have the summations, and then when
21 we hear all of the evidence I can really
22 get into it to explain to you why we feel
23 that this claim doesn't have merit and ask
24 that you reject it. I will appreciate your
25 attention throughout. Thank you.

1 THE COURT: Mr. Semple?

2 MR. SEMPLE: Mr. Eggert, please.

3
4 T H O M A S W. E G G E R T , 25-A Garden Village
5 Drive, Cheektowaga, New York, called as a witness on his
6 own behalf, and being first duly sworn, testified as
7 follows:

8 DIRECT EXAMINATION BY MR. SEMPLE:

9 Q. Mr. Eggert, can you tell us where you live, please?

10 A. I live at 25-A Garden Village Drive.

11 Q. Are you married or single?

12 A. I'm single.

13 Q. How long have you resided at that Garden Village
14 address?

15 A. Approximately five years.

16 Q. Were you in the military service, Mr. Eggert?

17 A. Yes, I was.

18 Q. And what branch of the service was that?

19 A. Army.

20 Q. Did you receive an honorable discharge?

21 MR. GRIFFIN: If your Honor please, I don't see
22 what that has to do with the accident of
23 June of '71.

24 MR. SEMPLE: Just introductory matter, your Honor.
25

1 BY MR. SEMPLE:

2 Q. Mr. Eggert, can you tell us by whom you are employed?

3 A. I am employed by the Erie Lackawanna Railway.

4 Q. How long have you been employed by the Erie Lackawanna?

5 A. Approximately twenty-three years.

6 Q. And when you first hired on the Erie Lackawanna what
7 was your job?

8 A. I was a fireman.

9 Q. Did you eventually become an engineer?

10 A. Yes, I did.

11 Q. Could you tell us through what process you become
12 an engineer?

13 A. Through numerous tests, air brakes and mechanical
14 tests, and years of experience.

15 Q. Do you recall in what year you became promoted to
16 engineer?

17 A. 1960.

18 Q. Mr. Eggert, have you had any other accidents, other
19 than this particular one of June 22, 1971 --

20 A. Yes.

21 Q. -- either railroad or otherwise?

22 A. Yes, I have.

23 Q. Did you have one some time in 1951?

24 A. Yes, I did.

25 Q. And do you recall, very briefly, what the basics of

1 that accident were?

2 A. I was a passenger in an automobile that had an
3 accident, and I fractured my spine.

4 Q. Okay. Were you employed at the time by anyone?

5 A. I was employed by Bladen-Henderson.

6 Q. That accident happened in the course of your employ-
7 ment?

8 A. Yes, it did.

9 Q. And that would be workmens compensation?

10 A. Yes.

11 Q. Do you recall whether or not you received an award
12 from that?

13 A. Yes.

14 MR. GRIFFIN: I object, if your Honor please.

15 THE COURT: Yes, the injuries he received may be
16 pertinent, but what happened in the case
17 is not.

18 BY MR. SEMPLE:

19 Q. Mr. Eggert, have you ever injured either of your
20 knees prior to this particular accident?

21 A. Yes, I injured my right knee.

22 Q. Do you recall what year that was?

23 A. I believe it was 1952.

24 THE COURT: Which knee was that?

25 THE WITNESS: My right knee.

1 BY MR. SEMPLE:

2 Q. Which knee was injured in this accident?

3 A. Left knee.

4 Q. Have you ever had any prior problems with your left
5 knee?

6 A. Yes, I have.

7 Q. And when was that?

8 A. That was in 1966, I believe.

9 Q. Was that only your left knee or was that both?

10 A. That was both knees.

11 Q. Can you tell us what the problem was?

12 A. It was a stiffness in the knees and it was attributed
13 to possibly drinking --

14 THE COURT: No, you are not a doctor.

15 THE WITNESS: All right.

16 BY MR. SEMPLE:

17 Q. All right. Just tell us what your problem was.

18 A. Stiffness.

19 Q. Did you seek medical attention for that?

20 A. Yes, I did.

21 Q. And did you continue to be bothered by that particular
22 problem after you sought medical attention?

23 A. No.

24 Q. Do you recall approximately when that particular
25 problem cleared up?

1 A. It was a short time, maybe a month or so after I went
2 to see the doctor. It wasn't too long.

3 Q. Had you had any problems with your left knee at any
4 time between this 1966 occurrence and the occurrence
5 of June 22, 1971?

6 A. No.

7 Q. You felt all right, the knee felt all right?

8 A. Fine.

9 Q. You never received any medical attention, as far as
10 you know, for that left knee?

11 A. None whatsoever.

12 Q. Mr. Eggert, were you in the employ of the Erie
13 Lackawanna on June 21, 1971?

14 A. Yes, I was.

15 Q. And were you working a regular job at that time?

16 A. No, I wasn't.

17 Q. What job -- well, were you working off the list then?

18 A. Yes, I was.

19 Q. Can you tell us briefly what it means to work off of
20 a list?

21 A. Well, it's a first in first out procedure. You rotate
22 in the number of men that would be on the board, and
23 as you come to the top of the list you work, and when
24 you finish working you go to the bottom, and continue
25 like that.

- 1 Q. Were you called to report for duty some time on the
2 day before this accident?
- 3 A. I don't believe I worked the day previous to the
4 accident.
- 5 Q. Were you called for work some time on June 21st?
- 6 A. Yes, I was.
- 7 Q. Do you recall what time you were to report for duty?
- 8 A. Ten-thirty p.m.
- 9 Q. Do you recall what your job was?
- 10 A. A utility job.
- 11 Q. Had you ever been injured on the railroad in any
12 way prior to this particular accident?
- 13 A. Yes, I have.
- 14 Q. Do you recall when that was?
- 15 A. I believe '59, 1959.
- 16 Q. Do you recall what happened?
- 17 A. I was thrown through a window of a locomotive.
- 18 Q. Did you have another injury on the railroad?
- 19 A. Yes, I did.
- 20 Q. When was that one?
- 21 A. That I'm not sure of. That could have been in the
22 50's or the early 60's.
- 23 Q. Do you recall basically what that injury was?
- 24 A. A sprained wrist.
- 25 Q. Are those the only injuries on the railroad you have

1 ever had, other than this accident in question here?

2 A. There's one more. I got a piece of steel in my left
3 eye.

4 Q. Is that it?

5 A. That's it.

6 Q. How long have you been employed with the Erie Lacka-
7 wanna?

8 A. Approximately twenty-three years.

9 Q. Getting back to June 21st, do you recall what job
10 you were called to work?

11 A. I believe it was an extra utility, it was a utility
12 engine.

13 Q. Would that job have had a job number?

14 A. It may have, I'm not certain on that.

15 Q. You don't remember if it did?

16 A. No, I don't, not offhand.

17 Q. Do you recall -- strike that. Can you tell me where
18 you reported to on that evening?

19 A. Halstead Yard Office.

20 Q. Where is Halstead Yard Office located, which yard?

21 A. It's located in the Bison Yard.

22 Q. Where is that?

23 A. That is in East Buffalo, New York.

24 Q. And who operates or controls this yard?

25 A. The Erie Lackawanna.

- 1 Q. Was any other railroad working in that yard?
- 2 A. Norfolk & Western.
- 3 Q. The Norfolk & Western?
- 4 A. Yes.
- 5 Q. When you reported for duty where did you meet your
- 6 crew?
- 7 A. At the Halstead Yard Office.
- 8 Q. Is that the first indication that you have who your
- 9 fellow crew members are going to be?
- 10 A. Yes.
- 11 Q. Do you recall who the crew members were on that
- 12 particular evening?
- 13 A. Mr. Kendall, my fireman, and I'm not sure of the
- 14 ground crew.
- 15 Q. Is there some way that you determine who is the
- 16 fireman of this crew and who is the engineer?
- 17 A. No, this is automatically, you know you are the
- 18 engineer. I'm an engineer, Mr. Kendall is a fireman,
- 19 that is his status, and engineer is my status at
- 20 this time.
- 21 Q. Do you know if he was a qualified engineer at the
- 22 time?
- 23 A. I'm not absolutely sure if he was promoted at that
- 24 time or not.
- 25 Q. Had you ever worked with him on prior occasions?

1 A. Yes, I have.

2 Q. On prior occasions had he operated the engine as
3 you were working?

4 A. Yes, he had.

5 Q. Mr. Eggert, at some time did you go out and determine
6 which engine that you were going to be working in
7 that evening?

8 A. Yes.

9 Q. Do you recall which engine it was?

10 A. N & W 2500.

11 Q. Was this told to you in that yard office you spoke
12 of earlier?

13 A. Yes, it was.

14 Q. Did you eventually go out to that engine?

15 A. Yes.

16 Q. When you got there was that engine -- did it have
17 cars attached to it or was it light?

18 A. It was light.

19 Q. When you say "it was light," what do you mean?

20 A. It was -- nothing was coupled to it.

21 Q. What was the first thing that you did, if anything,
22 when you arrived at the N & W 2500 engine?

23 A. Well, I made an inspection, walking around the
24 locomotive.

25 Q. When you walk around the locomotive what are you

1 looking for?

2 A. Grab irons -- looking for damage, for instance, grab
3 irons, steps, oards, also checking brake cylinder
4 travel, and everything. Just things in general to
5 make sure the locomotive is in good order.

6 Q. All right. Was it dark when you did this?

7 A. Yes.

8 Q. Do you know approximately what time you did this?

9 A. Well, this would be, I would say, around quarter to
10 eleven.

11 Q. Where was Mr. Kendall when this inspection was taking
12 place?

13 A. He was around and about the locomotive, I don't know
14 just where.

15 Q. Did you eventually go up in the cab of that engine?

16 A. Yes, I did.

17 Q. And did you have some conversation with Mr. Kendall
18 prior to beginning to run the engine or work that
19 evening?

20 A. Well, yes, because, you know, we decided who would
21 start.

22 Q. And who was -- who started that particular evening?

23 A. Mr. Kendall.

24 Q. He was running the engine, was he?

25 A. Yes, he was.

1 Q. Had you run the engine at any time prior to your
2 accident that you recall?

3 A. Not that I can recall.

4 Q. Can you tell us, when you got in the engine you were
5 about to assume your duties as a fireman, were you?

6 A. I was assuming the duties of the fireman, yes, when
7 I'm on the left side.

8 Q. You were the engineer, right?

9 A. Right.

10 Q. If you are not operating the engine and you are on
11 the left side, no matter what your title is you are
12 still the fireman?

13 A. Right.

14 Q. And those are the duties that you perform in that
15 engine?

16 A. Yes.

17 Q. Can you tell us basically what the duties of a fireman
18 are?

19 A. Well, the duties of a fireman are to watch the left
20 side, and one of the most important things is to,
21 you know, communicate any danger or anything of this
22 sort. Otherwise, when under running, you are a
23 lookout to make sure there is no problems, alert
24 the engineer or the man running the engine of any
25 problem arising.

1 Q. Tell me, can the engineer see anything going on on
2 the left side of the engine from his seat on the
3 engineer's side?

4 A. I'm sorry, I don't understand the question. Do you
5 mean the left side of the cab?

6 Q. On the left side of the cab.

7 A. No, it's dark. Silhouettes -- you could see the
8 silhouette of a person.

9 Q. Can you see anything out of the engine on the left
10 side?

11 A. No. From the right side?

12 Q. From the right side, from his position in the
13 engineer's seat?

14 A. Not very well, no.

15 Q. So that what you are there for is to help him see
16 what is on the left side?

17 A. Yes.

18 Q. Now, can you tell me, this N & W engine -- when you
19 say "N & W," is that Norfolk & Western?

20 A. Yes.

21 Q. What type of engine was this N & W 2500?

22 A. It's a road switcher class.

23 Q. And is there any other type of engine that you use
24 in this Bison Yard?

25 A. Yes.

1 Q. What type of engine is that?

2 A. A yard switcher.

3 Q. Can you tell me is there a difference between these
4 two engines?

5 A. Yes, there is.

6 Q. Will you tell the jury what the difference is, please?

7 A. Well, the yard switcher is basically a -- in my
8 opinion -- a better engine for yard service, for
9 switching cars. You have a low hood in front of you.
10 The hood doesn't run way up to the top of the loco-
11 motive. You can see over the hood and see things
12 in front of you. It's -- there's windows completely
13 around the cab, you've got vision completely around
14 the cab, which is necessary, as far as I'm concerned,
15 in a switching operation, and it's just all in all
16 a better functioning engine -- this is my opinion --
17 than a road switcher for yard service.

18 Q. You mentioned a hood, can you tell me what's a hood,
19 what part of the engine is that?

20 A. The hood is the covering over the actual diesel
21 engine.

22 Q. All right. That is -- is that the long part of this
23 yard switcher, is it?

24 A. Yes.

25 Q. And that is -- you say that is lower?

- 1 A. Yes, it is.
- 2 Q. Do you have windows all the way across the front of
- 3 this yard switcher?
- 4 A. Yes.
- 5 Q. How about the sides, what are the windows like on
- 6 the sides?
- 7 A. You've got side windows.
- 8 Q. How about the back?
- 9 A. Back windows, large back windows.
- 10 Q. Where is the door on this engine?
- 11 A. The door is in the center on the back, walking out
- 12 to the platform.
- 13 Q. Okay. Directly behind, if I understand you correctly,
- 14 this cab is a platform?
- 15 A. Yes.
- 16 Q. Nothing else back there?
- 17 A. No, a platform with a railing around it.
- 18 Q. There is no hood or anything back that way?
- 19 A. No.
- 20 Q. This particular night were you working with one
- 21 engine or two?
- 22 A. One engine.
- 23 Q. Can you describe to us what this road switcher is?
- 24 A. The N & W 2500 road switcher has a long hood which
- 25 covers the diesel engine to the rear, and this hood

1 is the height of the cab. It is straight across, more
2 or less, where you've got a blind spot, and the
3 front of this road switcher is what they call -- this
4 could be used for a boiler room, for a steam generator,
5 they call that the short end or the nose end, and this
6 again is high and it can be a blind spot.

7 Q. Can you describe the windows in this road switcher?

8 A. Well, the windows in the road switcher, in the doors,
9 are approximately eighteen inches wide by maybe
10 twenty-four inches high -- that is a guess -- and
11 there is one on each door. There's two doors in
12 the locomotive, one to the front, one to the rear,
13 one in front of the fireman's position, one to the
14 rear of the engineer's position, and then on the other
15 two bulkheads there are the same size windows, one
16 front and rear on both sides.

17 Q. Now, can you tell us, are the rear windows in a road
18 switcher any different from the rear windows in the
19 yard switcher?

20 A. They are a lot smaller.

21 Q. Smaller in which one?

22 A. In the road switcher.

23 Q. You were working in the road switcher on this particular
24 evening, were you?

25 A. Yes.

1 Q. Mr. Eggert, I am going to show you Plaintiff's Exhibit
2 7 marked for identification, and ask you if you can
3 identify that picture?

4 A. Yes, I can.

5 Q. And is that a fair and accurate representation of a
6 window in a road switcher?

7 A. Yes, it is.

8 Q. And that particular window is smaller than the one
9 that is contained in the yard switcher?

10 A. Yes, it is.

11 MR. SEMPLE: Your Honor, I offer this picture in
12 evidence.

13 MR. GRIFFIN: May I have a preliminary question?

14 THE COURT: Certainly.

15 PRELIMINARY EXAMINATION BY MR. GRIFFIN:

16 Q. Mr. Eggert, who took this picture?

17 A. I did.

18 Q. At the bottom of it it says EL 1241, is that correct?

19 A. Yes.

20 Q. You were on N & W 2500 at the time you claim you
21 were hurt, is that right?

22 A. Yes.

23 MR. GRIFFIN: Well, I object to this, your Honor,
24 because it is not the particular type of
25 engine that was involved here. It shows

1 many, many things. I think it is an improper
2 exhibit. It's got valves located in it,
3 it's got all sorts of different things.

4 THE COURT: Let me see it. At this point the
5 witness has indicated that this is a fair
6 representation of what it purports to show,
7 but there isn't any showing yet, Mr. Semple,
8 that what it shows has any relevance to
9 our lawsuit.

10 MR. SEMPLE: Your Honor, may I ask?

11 BY MR. SEMPLE:

12 Q. Mr. Eggert, this is EL 1241, is that right, that is
13 your notation on the rear of this picture?

14 A. Yes, it is.

15 Q. Number 7 for identification?

16 A. Yes.

17 Q. Is that window the same as the window that is in
18 N & W 2500?

19 A. Yes, it is.

20 Q. Exactly the same?

21 A. Yes, it is.

22 Q. Was that the same type of engine, that EL --

23 A. Yes.

24 Q. -- 1241, is that the same as N & W 2500?

25 A. It's basically the same body, car body.

1 Q. How about the window, was that the same?

2 A. Yes.

3 Q. Exactly the same, as far as you know?

4 A. Yes. As far as I know, yes.

5 MR. SEMPLE: Your Honor, I will reoffer the picture
6 in evidence.

7 THE COURT: Anything further, Mr. Griffin?

8 MR. GRIFFIN: I object, your Honor, on the grounds
9 that is -- I don't see any bearing upon this
10 case, and it is a different series of loco-
11 motive.

12 MR. SEMPLE: Your Honor, the man testified --

13 THE COURT: He said they are the same type, every-
14 thing is the same on the two engines.

15 MR. GRIFFIN: Then I will ask a couple more questions,
16 your Honor.

17 BY MR. GRIFFIN:

18 Q. Is it your testimony, Mr. Eggert, that -- locomotives
19 go in series, do they not? You have 1200 series,
20 you have 2000 series, 2500 series, is that correct?

21 A. Yes.

22 Q. All right. And the particular series of locomotive
23 that you were on on the night that you claim you
24 were hurt was N & W 2500 series?

25 A. Yes.

1 Q. And who is the manufacturer of that particular series
2 of locomotive?

3 A. General Motors.

4 Q. And the Erie Lackawanna 1200 series, who is the
5 manufacturer?

6 A. General Motors.

7 Q. Are the seats the same?

8 A. Basically the same.

9 Q. The seat that is shown in this doesn't have a back
10 on it, is that correct, in this photograph?

11 A. I believe that is the back that you can see there.
12 I don't believe you can see the seat. I believe it
13 is down below. I believe there is the back rest of
14 the rear seat.

15 Q. Is it your testimony that the position of the valve
16 is the same on this engine?

17 MR. SEMPLE: Your Honor, we are talking about the
18 window.

19 THE COURT: We are talking about everything shown
20 in the picture.

21 BY MR. GRIFFIN:

22 Q. Is it your testimony that the position of that
23 valve shown in the upper left hand side of this
24 picture is in the same position on the N & W engine?

25 A. No, it's not.

1 MR. GRIFFIN: We've got a case here, your Honor,
2 where the claim is that the man was hurt
3 with a brake valve. I object to it.

4 THE COURT: Yes. I think also, Mr. Semple, that
5 I would have to see some relevancy to having
6 the jury know what a window looks like. We
7 don't even know an accident happened. It
8 has been referred to but there has been no
9 testimony about it, nothing about what brought
10 it about. I will withhold --

11 MR. SEMPLE: I will withdraw the offer at this time,
12 your Honor. May I approach the bench a
13 moment?

14 THE COURT: Yes.

15 (Thereupon an off the record discussion
16 ensued at sidebar.)

17 (Mr. Semple exited the courtroom at
18 10:05 A.M. and returned at 10:08 A.M.)

19 MR. SEMPLE: Thank you, your Honor.

20 THE COURT: Better adapt your questioning accord-
21 ingly.

22 MR. SEMPLE: Excuse me?

23 THE COURT: Is your plan as you told me?

24 MR. SEMPLE: Yes, he will be here at eleven o'clock.

25 THE COURT: Well, get all your medical in then.

1 MR. SEMPLE: Yes.

2 BY MR. SEMPLE:

3 Q. Mr. Eggert, can you tell me, you did have an accident
4 some time on the evening of June 22, 1971, is that
5 right?

6 A. Yes.

7 Q. And now can you tell the jury in which direction you
8 were proceeding when the accident happened?

9 A. I was proceeding in a westerly direction.

10 Q. Okay. In which seat were you sitting?

11 A. I was sitting in the front seat on the fireman's
12 side.

13 Q. And is there a reason that you were sitting in the
14 front seat?

15 A. Yes.

16 Q. Okay. Timewise, I don't want to go into that now,
17 Mr. Eggert, but can you tell me, when you were pulling
18 these cars in a westerly direction -- you did have
19 a number of cars, is that right?

20 A. Right.

21 Q. Do you know how many you had?

22 A. Approximately twenty cars.

23 Q. Okay. And do you know what track you were on?

24 A. On the city main.

25 Q. Do you recall where you got these cars from?

1 A. No, I don't.

2 Q. Was Mr. Kendall operating the engine at this time?

3 A. Yes, he was.

4 Q. Do you know where the rear end of your train was?

5 A. At the time of the accident?

6 Q. At the time of the accident, approximately?

7 A. Halstead Avenue.

8 Q. Where is Halstead Avenue, is that across these tracks?

9 A. Yes, it is, Halstead Avenue is across these tracks.

10 Q. Is there a crossing there?

11 A. Yes.

12 Q. The tracks go across the road?

13 A. Yes, they do.

14 Q. When you were going across the road do you know
15 approximately what speed you were going?

16 A. Seven to eight miles an hour, somewhere around in
17 there.

18 Q. Do you recall what your -- what the move was going
19 to be?

20 A. The move was -- we were making an eastbound backup
21 move into the yard but we had to move in a westerly
22 direction to get over this switch so we could back
23 into the yard.

24 Q. Were you going to stay on the city main or go on
25 another track?

1 A. We would have moved in an easterly direction, we
2 would have been going off the city main, back into
3 the yard.

4 Q. On another track or on the same track?

5 A. It would have been another track, through what they
6 call the plant.

7 Q. Before you get onto another track do you have to
8 throw a switch?

9 A. Yes.

10 Q. That is not your job, you have nothing to do with
11 that?

12 A. Nothing to do with that.

13 Q. Do you know what switch was going to be thrown?

14 A. No, I'm not certain.

15 Q. All right. But you do know that you had to pull
16 somewhere past whatever switch it was, right?

17 A. Yes.

18 Q. How would you know when you are past the switch?

19 A. They would give us a signal that indicates stopping.

20 Q. Who is that?

21 A. The ground crew.

22 Q. That is either one of the brakemen or the conductor,
23 right?

24 A. Yes.

25 Q. Okay. And at the time of the accident did you have

Appendix A - Trial Record
Excerpts of Testimony of Thomas W. Eggert.

1 a conversation with Mr. Kendall prior to this accident?

2 A. Yes.

3 Q. And who initiated that conversation?

4 A. Mr. Kendall?

5 A. And can you tell us, do you recall what he said?

6 A. Not word for word.

7 Q. Can you give me the gist of what was said?

8 A. Yes.

9 Q. What was it?

10 A. He asked me if I could see anyone on my side.

11 Q. Which side is that?

12 A. The left side.

13 Q. All right. When he asked you this question were you
14 on straight track or on a curve?

15 A. On a curve.

16 Q. Where were you in this curve, like on the inside of
17 the curve or the outside of the curve?

18 A. The inside of the curve.

19 Q. Did you know where the ground crew was?

20 A. No. I presumed they were on the right.

21 Q. Which side is that, is that the engineer's side?

22 A. The engineer's side.

23 Q. How come you presumed that?

24 A. Because that is the side they were working from.

25 Q. When you say "the side they were working from" was

1 this earlier in the evening?

2 A. Yes.

3 Q. In response to Mr. Kendall's request can you tell
4 the jury what you did?

5 A. Well, Mr. Kendall asked me if I could see anyone on
6 my side, and I was sitting in a seat that was cocked,
7 the back rest -- the whole seat was cocked to the
8 side, and Mr. Kendall is over there in the cab, and
9 so I turned to him to ask him what he wanted, and
10 he said -- again he said, "Can you see anyone on
11 your side?" And I couldn't get around because the
12 seat was cocked, it wouldn't move, so I started to
13 get up to get out of this seat to go into the rear
14 seat so I could sit in that seat side saddle and
15 watch the signal for him and communicate to him face
16 to face.

17 Q. Did you attempt to do this?

18 A. Yes, I attempted to do this.

19 Q. When you got up do you know -- were you able to
20 make any approximation how fast this engine was
21 going?

22 A. Well, it was slowing down. I would say four to five
23 miles an hour, yard speed, somewhere around there.

24 Q. You don't know how he was slowing down, do you,
25 whether it was a brake or whether it was a throttle?

1 MR. GRIFFIN: I object to the form of the ques-
2 tion as leading.

3 THE COURT: Yes, sustained.

4 BY MR. SEMPLE:

5 Q. Do you know in what manner this engine was slowed
6 down?

7 A. He was throttling down. I could hear the engine
8 throttling down.

9 Q. And can you tell the jury what happened next?

10 A. As I was trying to get up to change from this seat
11 to go into the other seat I was knocked off balance,
12 and first I went back against the seat, and I tried to
13 catch myself with the seat but I couldn't hold on,
14 and I went from there into the wall, and from there
15 I went down onto the brake valve, which I hit my left
16 knee with, and down in a pile on the floor.

17 Q. Did you say anything to Mr. Kendall at this time?

18 A. Yes. I think he said to me, "What happened?" And
19 I said, "I hurt myself, I hurt my knee."

20 Q. Now, Mr. Eggert, can you tell me, do you know what
21 caused you to lose your balance or whatever caused
22 you to strike the wall?

23 A. It was a slack action.

24 Q. What is that?

25 A. That is the action of the cars coming in or out, in

1 this case in, coming in, the slack between the draw-
2 heads or the couplers of each car, there is some
3 slack, and when these come in and you have a number
4 of cars, as they come in you get the force of the
5 whole slack action.

6 MR. GRIFFIN: If the Court please, perhaps I should
7 have been up sooner. I again object to all
8 of this claim on the ground that it is never
9 asserted in the formal pleadings in this
10 court nor in the answers to interrogatories.
11 I move to strike such testimony on the
12 ground it was never asserted, there was never
13 any amendment to it or any advice to us that
14 such a claim would be asserted.

15 THE COURT: Same ruling. I will allow it in. Over-
16 ruled.

17 MR. SEMPLE: Your Honor, may I make a motion to
18 amend the interrogatories at this time?

19 THE COURT: There is no need to.

20 MR. SEMPLE: Thank you, your Honor.

21 BY MR. SEMPLE:

22 Q. Okay, Mr. Eggert, you say that this slack was running
23 in to you?

24 A. Yes, it was.

25 Q. And were you pulling these cars, is that what it was?

1 A. Yes, we were pulling.

2 Q. And in which direction were you pulling?

3 A. West.

4 THE COURT: Mr. Semple, there is one thing you've
5 got to keep in mind if your doctor is going
6 to be here at eleven, and if you want to get
7 him on and get him off, you've got to cover
8 the medical and afford Mr. Griffin ample
9 time for his cross examination.

10 MR. SEMPLE: Okay.

11 BY MR. SEMPLE:

12 Q. Mr. Eggert, as a result of this blow you received
13 some injury to your knee, did you?

14 A. Yes, I did.

15 Q. And did you at some time seek medical attention?

16 A. Yes, I did.

17 Q. And who was the first doctor that you saw?

18 A. Outside of company doctors?

19 THE COURT: Who was the first doctor you saw?

20 THE WITNESS: Dr. Militello.

21 BY MR. SEMPLE:

22 Q. And when you saw Dr. Militello what, if anything,
23 did Dr. Militello do for you when he examined you?

24 A. He examined me.

25 Q. Where was this?

* * * * *

1 A. Yes, it did improve.

2 Q. And when was the last time that you examined Mr.
3 Eggert?

4 A. That is in the report of 9 October 1975, that is the
5 one I just brought in.

6 Q. Okay. Can you tell me what your findings were on
7 that particular time?

8 A. He still had some restriction of full flexion, he
9 couldn't go all the way back, he lacked possibly
10 ten degrees, which frankly isn't necessary unless
11 in the course of your occupation you have to go full
12 squat. He still had some grinding in his kneecap,
13 he still complained of pain in it, but he had good
14 stability, and his musculature was not up to normal.

15 Q. It was not up to normal?

16 A. That is correct.

17 Q. Doctor, do you have any opinion as to the permanency
18 of this injury?

19 A. Yes, I have an opinion.

20 Q. Can you tell me what that opinion is?

21 A. I feel that this man has a partial permanent disability
22 involving this knee, and as part of the extremity,
23 makes it a partial permanent disability to the
24 extremity.

25 Q. Is there anything that can be done about it further?

1 A. No, he has to live within its limitation.

2 Q. Doctor, based on the history you received from Mr.
3 Eggert and from what you know about the blow, can you
4 tell me with reasonable medical certainty whether or
5 not this blow was the competent producing cause of
6 the -- I believe -- the degeneration and the tear of
7 the cartilage and the patella crepitus.

8 A. I can't say that it was the cause of it, but based
9 on Dr. Curtin's original examination, it is reasonable
10 to assume that it was, however, he could have had
11 some softening prior to this which had not been
12 manifested, because the only way you could tell that
13 would be to have the opportunity to take a direct
14 look at it, which obviously there was no indication
15 for. He subsequently developed significant changes
16 in his joint that required this treatment as we have
17 outlined here today. So I would say that it is --
18 it was a competent producing cause. The fall that
19 he sustained was a competent producing cause of the
20 fissuring or the tear that was found in the meniscus
21 at a later date, based on his description to me of
22 the fall and the findings when I first examined him,
23 as I have earlier testified to.

24 MR. SEMPLE: Okay, Doctor, thank you very much.

25 Mr. Griffin?

* * * * *

1 MR. SEMPLE: Your Honor, should I put Mr. Eggert
2 back on?

3 THE COURT: Yes.

4 T H O M A S W. E G G E R T , having been previously
5 duly sworn, testified as follows:

6 DIRECT EXAMINATION BY MR. SEMPLE: (Cont'd.)

7 Q Mr. Eggert, I think we kind of jumped into the
8 accident, I'll try and go back a little prior to
9 the time of this accident. Mr. Eggert, I will show
10 you Plaintiff's Exhibit 1 for identification, and
11 I am going to ask you to look at that picture, and
12 I ask you if you can identify that?

13 A. Yes, I can.

14 Q And is that the type of arrangement that was inside
15 this N & W engine on the date of this accident?

16 A. Yes.

17 Q And is this picture -- there is an indication on
18 the back here, EL 1241, what is that number, is that
19 the engine number again?

20 A. That is the engine number.

21 Q Okay. And that is not the 2500?

22 A. No, it's not.

23 Q Not the one -- there is no claim that is the 2500?

24 A. No.

25 Q But is this the exact position of the seats in that

1 2500 engine?

2 A. Yes, more or less, it's the same seating arrangement.

3 THE COURT: How much more or less?

4 THE WITNESS: I would say it's pretty accurate.

5 THE COURT: All right.

6 MR. SEMPLE: Your Honor, I will offer this in
7 evidence.

8 MR. GRIFFIN: May I, preliminarily, if it please the
9 Court?

10 THE COURT: Yes.

11 PRELIMINARY EXAMINATION BY MR. GRIFFIN:

12 Q. Mr. Eggert, again, this is the same Erie Lackawanna
13 1241 engine that was Exhibit 7 that we had a picture
14 of this morning?

15 A. Yes.

16 MR. GRIFFIN: Well, on that basis then, your Honor,
17 it is the same as the previous exhibit that
18 was ruled out.

19 THE COURT: I ruled it out before because there
20 hadn't been any showing of any need to have
21 the jury or anybody else know what a
22 window looked like. Now we have testimony
23 involving seats and valves.

24 BY MR. GRIFFIN:

25 Q. No valve appears in this photograph, does it?

1 A. No.

2 Q. And were the type of seats in this picture, namely,
3 round seats with a pipe back up and then another pipe,
4 are they the exact type of seats that were on the
5 engine that you were operating the night of the
6 accident?

7 A. Yes, it's the same type of seat.

8 Q. And what appears to be a window with something in
9 the center of it in that photograph, is that the
10 same as on the Norfolk & Western engine?

11 A. The same side window you mean?

12 Q. Yes.

13 A. Yes.

14 MR. GRIFFIN: I object to the photograph, your Honor,
15 on the ground that is a different locomotive.

16 THE COURT: I will receive the exhibit.

17 (Plaintiff's Exhibit 1, previously
18 marked for identification, was received and
19 marked in evidence.)

20 MR. SEMPLE: Thank you, your Honor.

21 BY MR. SEMPLE:

22 Q. Now, Mr. Eggert, from this picture can you describe
23 how the seats are arranged in that -- in the cab
24 of that --

25 THE COURT: Doesn't the picture show it?

1 MR. SEMPLE: Yes, your Honor.

2 THE COURT: Then you don't need any testimony. That
3 is why we have pictures.

4 MR. SEMPLE: Okay.

5 (Photograph displayed to the jury.)

6 BY MR. SEMPLE:

7 Q. Mr. Eggert --

8 THE COURT: If you are going to show it to the
9 jury, wait until they examine it. Excuse,
10 me. Mr. Semple, we will adjourn at this time
11 until one o'clock. You will be back down-
12 stairs at one o'clock. We will bring you
13 upstairs as soon as we are ready to go.

14 (Thereupon the court was in recess at
15 12 Noon.)

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1 PROCEEDINGS RESUMED, PURSUANT TO RECESS, COMMENCING AT
2 1:05 P.M.

3
4 (Counsel present, jury present.)
5

6 T H O M A S W. E G G E R T , called as a witness
7 in his own behalf, and having been previously duly sworn,
8 testified as follows:

9 DIRECT EXAMINATION BY MR. SEMPLE: (Cont'd.)

10 Q. Mr. Eggert, can you tell me the position of the
11 front seat in that N & W engine as it was on the
12 night of June 21, 1971?

13 A. Well, it was about eight to ten inches off center.

14 Q. Can you tell me what you mean by "off center"?

15 A. It was turned to the left, the seat was turned to
16 the left.

17 Q. Did the seat have a back rest on it?

18 A. Yes, it does.

19 Q. And can you tell the jury was the back rest facing
20 toward the wall or facing toward the other side of
21 the engine, Mr. Eggert?

22 THE COURT: To the left side of the engine.

23 BY MR. SEMPLE:

24 Q. Was it facing to the left side or over to the right
25 side of the engine, more or less?

1 THE COURT: He said it was to the left.

2 THE WITNESS: The back rest would have been to the
3 right. The seat was counter -- the seat
4 was turned counter clockwise, putting the
5 back rest over here.

6 BY MR. SEMPLE:

7 Q. You've got to explain it to us. "Over here," was
8 it --

9 A. Toward the center of the cab.

10 Q. Over toward the engineer's side or the right side
11 of the cab?

12 A. Yes.

13 Q. Okay. And which seat do you usually sit in in this
14 type of engine?

15 A. The rear seat.

16 Q. Okay. And I think you have testified earlier that
17 you couldn't sit in this rear seat?

18 MR. GRIFFIN: Objection.

19 THE COURT: I will object myself. Don't lead
20 the witness. He didn't testify to that,
21 Mr. Semple. Don't lead him.

22 MR. SEMPLE: I thought he had.

23 BY MR. SEMPLE:

24 Q. Mr. Eggert, did you attempt to sit in the rear seat?

25 A. Yes, I did.

1 Q. And were you able to sit in the rear seat?

2 A. I was able to sit in it but I had no leg room.

3 Q. Okay. When you say you usually sit in this rear
4 seat, what do you do to make leg room, if anything?

5 A. I turn the seat around.

6 Q. Which seat is this?

7 A. The front seat.

8 Q. What does that do when you turn it around?

9 A. When you turn it around the back rest and the appar-
10 atus that is hooked to the seat frame swings out of
11 the way giving you more leg room.

12 Q. Okay. And have you been able to turn these seats
13 around in the past?

14 A. Yes.

15 Q. And how do these seats operate when you turn them
16 around?

17 A. They swivel.

18 Q. What do you have to do to make it swivel?

19 A. Just turn it, take shold of it and turn it.

20 Q. Is there a latch that has to be removed?

21 A. Some of them have a latch, others don't.

22 Q. How about this N & W 2500, was there a latch on
23 that seat?

24 A. I'm not absolutely sure.

25 Q. Did you attempt to turn this front seat in the

1 N & W 2500 engine?

2 A. Yes.

3 Q. What happened when you made your attempt to turn it?

4 A. It wouldn't turn.

5 Q. Which seat did you eventually sit in that evening?

6 A. The front seat.

7 Q. Okay. And when you are working in the Bison Yard,
8 can you tell me in which general direction the tracks
9 run?

10 A. They run east and west.

11 Q. And had you made any moves prior to the time this
12 accident occurred?

13 A. Yes.

14 Q. Do you know how many?

15 A. No, I don't know how many. Several.

16 Q. Do you know in which direction these moves were?

17 A. Both east and west.

18 Q. At the time of the accident which direction were
19 you proceeding?

20 A. We were proceeding west.

21 Q. And then what were you going to do?

22 A. Make an eastbound movement.

23 Q. When you were proceeding west what were you doing
24 with these cars?

25 A. Pulling them up over the switch, over Halstead Street.

1 Q. Then when you began to proceed in this easterly
2 direction you would then be doing what to the cars?

3 A. In the easterly direction?

4 Q. Yes.

5 A. Showing the cars.

6 Q. Okay. Now, when you made some of these prior easterly
7 moves -- strike that. Can you tell me, in connection
8 with your duties as fireman, which direction would
9 you be looking?

10 A. Looking in the direction that the locomotive is
11 moving.

12 Q. If the locomotive is moving west you look west, is
13 that it?

14 A. Yes.

15 Q. The same thing similarly for an easterly direction,
16 you look east?

17 A. Yes.

18 Q. And had you had occasion to look in an easterly
19 direction prior to the accident on this evening?

20 A. Yes.

21 Q. Had Mr. Kendall asked you to look for any signals
22 prior this evening, other than the time he asked
23 you immediately prior to your accident?

24 A. No.

25 Q. Had he made any request of you for signals, to your

1 knowledge, whatsoever?

2 A. No.

3 Q. Was that ground crew working on your side of the
4 engine?

5 A. No.

6 Q. At any time that evening, as you recall?

7 A. No, they were not.

8 Q. They were working off which side of the engine?

9 A. The engineer's side.

10 Q. In your experience -- has it been your experience
11 that the ground crew will ordinarily work off the
12 engineer's side if possible?

13 A. Yes. Only in case of necessity on the other side.

14 Q. What would be one of the necessities where they
15 would work off the fireman's side of this engine or
16 any engine?

17 A. A curve or some obstruction of some sort.

18 Q. Now, we talked about ground crews, are you familiar
19 with the way the ground crew passes signals?

20 A. Yes, I am.

21 Q. In what manner do they pass them?

22 A. Well, at night, by lamp.

23 Q. And do you always have all three members of a ground
24 crew in sight?

25 A. No.

1 Q. How do they get the signals up to the engine?

2 A. Well, they spread out along the way.

3 Q. Okay. Then what do they do?

4 A. They pass signals to each other and, in return, to
5 the engineer.

6 Q. Kind of like a relay system, is it?

7 A. Yes.

8 Q. Each one is supposed to keep the other guy in sight,
9 is that it?

10 A. That is right.

11 Q. What are you supposed to do if you lose sight of
12 them?

13 A. Stop.

14 Q. That is the rule?

15 A. Yes.

16 Q. Custom and practice, is it?

17 A. Yes.

18 Q. Mr. Eggert, at any time prior to this accident had
19 you had occasion to move from the front seat except --
20 strike that. At any time prior to the immediate
21 happening of the accident had you had occasion to move
22 from your front seat?

23 A. No.

24 Q. You remained in the front seat, did you?

25 A. Yes.

- 1 Q. Had you operated the engine earlier that evening?
- 2 A. No, I hadn't.
- 3 Q. Did you ever make another attempt to change the
- 4 position of the front seat?
- 5 A. Later on that evening -- that morning, yes.
- 6 Q. When was this, was this after the accident?
- 7 A. Yes.
- 8 Q. Do you know about what time that was?
- 9 A. About four a.m., approximately.
- 10 Q. Where had you been prior to making that second attempt
- 11 to change the position of that front seat?
- 12 A. I had gone in the Halstead Avenue office to -- we
- 13 were in for lunch, and I went in to call the train-
- 14 master and tell him what had happened.
- 15 Q. What you say "what had happened," did you tell him
- 16 what happened?
- 17 A. Yes, I did.
- 18 Q. Do you recall who you spoke to?
- 19 A. I'm not sure of his name. It was a trainmaster, I'm
- 20 not sure of his name. I believe he is a N & W man.
- 21 Q. Did you talk to him personally or over the phone?
- 22 A. I talked to him over the phone first.
- 23 Q. Then what happened?
- 24 A. He came down.
- 25 Q. Okay. Did you talk to him again when he came down?

1 A. Yes.

2 Q. Where?

3 A. In the Halstead Avenue office.

4 Q. How long did you talk to him?

5 A. Ten or fifteen minutes.

6 Q. Do you know if he made out an accident report?

7 A. Yes, he did.

8 Q. Did you see that report?

9 A. No, I didn't.

10 MR. SEMPLE: Mr. Griffin, do you have that report?

11 MR. GRIFFIN: Yes.

12 BY MR. SEMPLE:

13 Q. Never seen this accident report before?

14 A. I didn't see it. I may have signed it --

15 THE COURT: Do you want to mark that for iden-
16 tification as an exhibit?

17 MR. SEMPLE: Yes, your Honor.

18 (Accident report marked Plaintiff's
19 Exhibit 15 for identification.)

20 BY MR. SEMPLE:

21 Q. Mr. Eggert, I am going to ask you to look at Plaintiff's
22 Exhibit 15 for identification, take a look at it, and
23 tell me if you ever saw that accident report or
24 reviewed that particular accident report before?

25 A. Never. The one that he wrote out was in longhand,

1 there was no typewriter involved.

2 THE COURT: Your answer is no, you have never seen
3 that piece of paper before?

4 THE WITNESS: No, I haven't.

5 BY MR. SEMPLE:

6 Q. Mr. Eggert, you told us earlier that you struck your
7 knee on the brake valve in this engine?

8 A. Yes.

9 Q. I am going to show you Plaintiff's Exhibits 2 and
10 6 for identification, and ask you if you can identify
11 those pictures?

12 A. This is the type of brake valve I hit myself on --
13 my knee on.

14 Q. Are you referring to Plaintiff's Exhibit 2, is that
15 the type?

16 A. That is the type.

17 Q. And referring to Plaintiff's Exhibit 6, is that the
18 type that you refer to?

19 A. That is the type.

20 Q. That is a closer view?

21 A. Yes.

22 Q. Mr. Eggert, I ask you if this is a fair and accurate
23 representation of the type of brake valve that you
24 struck your knee on?

25 A. Yes, it is.

1 Q. And a fair and accurate representation of the brake
2 valve that was on that N & W 2500 engine?

3 A. Yes.

4 Q. Is this a picture of the N & W 2500 engine brake
5 valve?

6 A. Not the 2500, no.

7 Q. Which one is it?

8 A. 2570.

9 Q. Is that the same series, 2500 series?

10 A. Yes.

11 Q. Same type of engine?

12 A. Yes.

13 MR. SEMPLE: Your Honor, I will offer these in
14 evidence.

15 MR. GRIFFIN: No objection.

16 THE COURT: Plaintiff's Exhibits 2 and 6 are in
17 evidence.

18 (Plaintiff's Exhibits 2 and 6, pre-
19 viously marked for identification, were
20 received and marked in evidence.)

21 (Photographs displayed to jury.)

22 BY MR. SEMPLE:

23 Q. Mr. Eggert, in either Plaintiff's Exhibit 6 or
24 Plaintiff's Exhibit 2 in evidence is there a guard
25 on either of those brake valves?

1 A. No, there isn't.

2 Q. Have you ever had occasion to see a brake valve with
3 a guard on it?

4 MR. GRIFFIN: I object to that.

5 BY MR. SEMPLE:

6 Q. Any of the 2500 series engines?

7 THE COURT: Sustained.

8 BY MR. SEMPLE:

9 Q. Some engines have guards on them for these brake
10 valves?

11 THE COURT: Leading.

12 BY MR. SEMPLE:

13 Q. Mr. Eggert, I am going to show you a couple more
14 pictures. I show you Plaintiff's Exhibit 4 marked
15 for identification, and ask you if you can identify
16 that picture?

17 A. Yes, I can.

18 Q. And can you tell me what type of engine that is
19 off of?

20 A. That is a N & W engine, 4154.

21 Q. It is not the 2500 series?

22 A. No, it's not.

23 Q. Is this valve that is portrayed in that picture
24 different than the one portrayed in Plaintiff's
25 Exhibit 2 and Plaintiff's Exhibit 6?

1 A Yes, it has a guard.

2 MR. GRIFFIN: I object.

3 THE COURT: That question and answer is stricken.

4 BY MR. SEMPLE:

5 Q. Does this picture fairly and accurately represent
6 what a guard would look like on one of these brake
7 valves?

8 THE COURT: Don't ask that type of question. Ask
9 another question. The jury will ignore any-
10 thing in the lawyer's question that might
11 be testimony.

12 BY MR. SEMPLE:

13 Q. Mr. Eggert, can you tell me approximately how many
14 N & W 2500 series engines you have worked on?

15 A. No, that would be a little difficult.

16 Q. Have you worked on more than one?

17 A. Yes.

18 Q. Do they all have exactly the same setup as shown
19 in Plaintiff's Exhibit 2, as far as brake valves
20 is concerned?

21 A. I can't say that. The ones that I have been on have.

22 Q. They are all that way?

23 A. In this series of engines, yes.

24 Q. Have you ever worked on the N & W 4000 series
25 engines?

1 A. I may have.

2 Q. Do you know?

3 THE COURT: Prior to the accident?

4 BY MR. SEMPLE:

5 Q. Prior to the accident?

6 A. I can't say absolutely.

7 Q. Have you worked on engines that had a fireman's
8 brake valve set up different from this one?

9 A. Yes.

10 MR. GRIFFIN: I object, if the Court please. It
11 is outside the scope of this case. He was
12 on a particular type of locomotive at the
13 time.

14 THE COURT: I won't allow any further inquiry.

15 MR. SEMPLE: Okay, your Honor.

16 BY MR. SEMPLE:

17 Q. Mr. Eggert, do you recall the dates that you were off
18 work immediately after the accident, your best
19 approximation?

20 A. I'm sorry. Would you repeat that, please?

21 Q. Can you give me your approximation of how long you
22 were off work immediately after this accident?

23 A. Approximately six months, a little bit more.

24 Q. Were you off work again after your surgery?

25 A. Yes, I was.

1 Q And can you tell me approximately how long a period
2 of time that was?

3 A. That was approximately six months.

4 Q. Were you able to make any computation as to the
5 earnings that you lost during that six month period?

6 A. Yes, I have been.

7 Q. Can you briefly tell us how you made that computation?

8 A. By other men's wage earnings.

9 Q. These men were in a similar position to you?

10 A. Yes.

11 Q. Similar in seniority to you?

12 A. Yes.

13 Q. Can you give me an approximation of the amount of
14 wages that you lost for the initial six month period?

15 MR. GRIFFIN: I object to this.

16 THE COURT: Sustained.

17 BY MR. SEMPLE:

18 Q. Mr. Eggert, can you tell me how much you were making
19 a week just prior to this accident?

20 A. Not without looking.

21 THE COURT: Looking at what?

22 THE WITNESS: The record.

23 BY MR. SEMPLE:

24 Q. Which record?

25 A. The time books.

1 Q. Would that show in your time books what you were
2 making?

3 A. Yes.

4 Q. Can you give me an approximation?

5 A. Probably --

6 THE COURT: Well, are the time books available?
7 (Thereupon time books referred to
8 were marked Plaintiff's Exhibits 16 and 17
9 for identification.)

10 BY MR. SEMPLE:

11 Q. I am going to show you Plaintiff's Exhibit 16, which
12 purports to be a red book with the marking 1970 on
13 the front, and Plaintiff's Exhibit 17 for identifica-
14 tion having the year 1971 on the front, can you
15 identify these booklets?

16 A. Yes, I can.

17 Q. And can you tell me what they are?

18 A. They are my time records.

19 Q. Can you take a look at the 1971 book and give me
20 an estimate of how much you were making a week prior
21 to June 22, 1971?

22 A. Do you want me to read some of these?

23 Q. Can you figure from there?

24 A. I have a total.

25 Q. Where is the total, at the end of a week?

1 A. Yes.

2 MR. SEMPLE: Your Honor, I think before he refers
3 to them, I should offer them in evidence.
4 Mr. Griffin?

5 MR. GRIFFIN: I don't have any objection if he keeps
6 them on a day by day basis.

7 THE COURT: Who keeps them?

8 MR. GRIFFIN: I think they are his books. I sub-
9 poenaed them.

10 MR. SEMPLE: I don't care if they are in evidence
11 or not, but if he is going to refer to them
12 perhaps the Court might want them in evi-
13 dence.

14 THE COURT: I think they had better be. You say
15 you have no objection if they were kept by
16 Mr. Eggert?

17 MR. GRIFFIN: No.

18 THE COURT: Plaintiff's Exhibits 16 and 17 are
19 in evidence.

20 (Plaintiff's Exhibits 16 and 17,
21 previously marked for identification, were
22 received and marked in evidence.)

23 BY MR. SEMPLE:

24 Q. These are gross figures, I assume?

25 A. Yes, gross.

1 Q. Can you read me some of these weeks prior to June
2 22nd?

3 A. Period ending June 8th, our week ends on a Tuesday,
4 total \$307.

5 THE COURT: What year is this?

6 THE WITNESS: June 1971. Tuesday the 8th, total
7 \$307.

8 BY MR. SEMPLE:

9 Q. The week after that?

10 A. Week ending Tuesday the 15th, \$290.

11 Q. Yes?

12 A. The week ending the 22nd, which I worked the 21st
13 but didn't work the 22nd, \$234.

14 Q. Okay, Mr. Eggert. In between 1971 and the present
15 time have you received any wage increases?

16 A. Yes, several.

17 Q. And what was your per day rate back in 1971?

18 A. I'll look here. \$40.

19 Q. \$40 per day?

20 A. Per day.

21 Q. What is your per day rate now?

22 A. \$58.32.

23 Q. Mr. Eggert, have you lost any other time, other than
24 those two six month periods in 1971 and the period
25 from June 14, 1972 to January 4, 1973?

1 A. Yes, I have.

2 Q. Do you know approximately how many other days off
3 that you have lost as a result of this injury in
4 1973?

5 MR. GRIFFIN: If the Court please, I object, that
6 is too general.

7 MR. SEMPLE: In 1973.

8 THE COURT: Yes or no. Overruled. You can answer
9 yes or no.

10 THE WITNESS: Would you repeat that, please?

11 BY MR. SEMPLE:

12 Q. Can you tell me how many days that you have lost in
13 1973?

14 A. Yes.

15 Q. Which you attribute to your knee injury?

16 A. Yes.

17 Q. Do you know what that figure is, will you tell us?

18 MR. GRIFFIN: I object to that.

19 THE COURT: Aren't there some records that you can
20 rely on?

21 THE WITNESS: Yes, I have that figured out.

22 THE COURT: You have records which show it?

23 BY MR. SEMPLE

24 Q. Does it show in your time book?

25 A. Yes, I have totaled most of these. I don't know as

1 they are in the time book, but I have them on a sheet
2 of paper, the amount of days off.

3 Q. Did you take this from the time books?

4 A. Yes, I did.

5 (Plaintiff's Exhibits 18 and 19 marked
6 for identification.)

7 BY MR. SEMPLE:

 Mr. Eggert, I will show you Plaintiff's Exhibits 18
8 and 19 and ask you if you can identify those notes?

9 THE COURT: What are the exhibits?

10 MR. SEMPLE: They are --

11 THE COURT: Let him state.

12 THE WITNESS: They are wage earning figures, time
13 off. The time off and the number of days
14 per month I was off month by month, and also
15 some wage earnings.

16 THE COURT: Are they records of any kind?

17 BY MR. SEMPLE:

18 Q. Did you compute these from your time books?

19 A. Yes, these days come from my time books.

20 THE COURT: The time books are here?

21 MR. SEMPLE: The time books are here, if we want
22 to go through them.

23 THE COURT: I will leave that up to you, Mr.
24 Griffin.
25

Appendix A - Trial Record
Excerpts of Testimony of Thomas W. Eggert.

1 BY MR. SEMPLE:

2 Q. Mr. Eggert, from your time book did you compute a
3 number of days that you lost, a total number of
4 days you lost in 1972 that you attribute to your
5 knee?

6 A. Yes.

7 Q. Can you tell me, does this note refresh your recoll-
8 ection?

9 A. Yes, it does.

10 Q. You got this out of your time book?

11 A. Yes. This is the amount of days from the time I was
12 off until I went back to work.

13 Q. Can you tell me how many days that was?

14 A. 205 days.

15 MR. GRIFFIN: I object to it, if the Court please.
16 Is that the six months?

17 BY MR. SEMPLE:

18 Q. I don't want the six months. All I want is the
19 additional time other than those six month periods.

20 A. I'm sorry. in '72?

21 Q. Did you lose any other days in 1972 --

22 A. Yes.

23 Q. -- other than the six month period?

24 A. Yes, I did, I lost a few days.

25 Q. Do you know how many more?

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1 A. No, I would have to look at the record for that.

2 Q. How about 1973?

3 A. Yes, I lost time.

4 Q. And was that in any particular -- that wasn't in
5 any month period, was it?

6 A. No, it wasn't.

7 Q. What is it?

8 MR. GRIFFIN: I object, if the Court please, spe-
9 culative, insufficient foundation. May I
10 see these exhibits being referred to?

11 THE WITNESS: Sure.

12 THE COURT: You are objecting, Mr. Griffin?

13 MR. GRIFFIN: Yes.

14 THE COURT: Sustained.

15 (Plaintiff's Exhibits 20 through 23
16 marked for identification.)

17 BY MR. SEMPLE:

18 Q. Mr. Eggert, I would ask you to look at Plaintiff's
19 Exhibits 20 through 23, and ask you if you can
20 identify them?

21 A. Yes, I can.

22 Q. What are they?

23 A. My time books.

24 Q. What years are they for?

25 A. '72, 3, 4 and 5.

1 Q. Do those books contain the information about the
2 days that you were off of work?

3 A. Yes. Those days aren't filled in as work days.

4 Q. Do they have any notation in there whether you are
5 off for injury or anything like that?

6 A. Some of them do, some don't. I kept a pretty close
7 record at first and then I didn't. When I was off
8 I didn't put anything in. Occasionally I would put
9 sick in there, occasionally I would put off, but
10 no consistent record.

11 Q. Do you know how many days you lost in 1975 up to
12 the present time?

13 MR. GRIFFIN: Objection, if the Court please. It
14 is obvious from these records that the man
15 is trying to claim every day that he didn't
16 work, whether it is a Sunday or Monday or
17 Saturday, that he was off sick. It is
18 not connected at all to this situation.

19 MR. SEMPLE: Your Honor, I don't think that is what
20 he is trying to claim. I am trying to get
21 here the days that he was off if he can
22 attribute them to the accident.

23 THE COURT: The question is the reliability of
24 the record, and, of course, I don't know
25 when Mr. Eggert first consulted an attorney

1 or had in mind any lawsuit on account of
2 the accident. If there did come a time
3 when either or both of those things happened,
4 assumably after that time any time off on
5 account of the injury would have been so
6 noted.

7 BY MR. SEMPLE:

8 Q In any of these bookd do you make any notation
9 definitely that you were off because of injury?

10 A Yes, I would write "Off sick."

11 Q Did you do it in '75?

12 A No.

13 Q Did you do it in '74?

14 A I don't believe so.

15 Q Do you know if you did it in 1971?

16 A I believe I did, but I'm not certain.

17 Q '72?

18 A I'm not sure.

19 Q '73?

20 A I'm not sure on '73.

21 Q Are you sure of the two six month periods?

22 A Yes, I am.

23 MR. SEMPLE: I have no further questions. Mr.
24 Griffin, your witness.
25

1 CROSS EXAMINATION BY MR. GRIFFIN:

2 Q. Mr. Eggert, I just want to see what your claim is
3 today during this trial relative to your accident.
4 Is it your claim that some part of your left knee
5 contacted part of the brake valve?

6 A. Yes, it is.

7 Q. And what level of the brake valve did it contact, was
8 it right up at the level and the height of this
9 so-called valve where the cock is?

10 A. I'm not certain where I contacted it.

11 Q. Well, haven't you repeatedly claimed and sworn in
12 the course of this case that you contacted the brake
13 valve right up at the level of the cock?

14 A. I'm not certain of that, no.

15 Q. My question is haven't you unequivocally sworn
16 repeatedly to the fact that you contacted the
17 brake valve up at the level of the angle cock?

18 A. If I have sworn to that, I can't be certain, no.

19 Q. Do you know whether you contacted the brake valve
20 at all?

21 A. Yes.

22 Q. Are you sure of that?

23 A. Yes, I am.

24 Q. And hasn't it been your claim that you contacted
25 that right at the angle cock, that is where you hit it?

1 A. That is what it felt like.

2 Q. And that is what you said?

3 A. Possibly.

4 Q. Is that as strong as you are going to make it,
5 "possibly"?

6 A. I'm not absolutely sure where I contacted the valve.

7 Q. You have previously testified and sworn to the fact
8 that you contacted it right at the angle cock, isn't
9 that right?

10 A. If I did, I'm not absolutely positive, I can't be.

11 Q. You have now figured out that the level of the angle
12 cock is quite a bit above the knee level of a person
13 that is standing in a locomotive cab, isn't that
14 true?

15 A. Yes.

16 Q. That is the fact, isn't it, that on that N & W engine
17 that you claim to have been in on the night of this
18 accident that the angle cock and the valve is above
19 your knee level, isn't that right?

20 A. I'm not sure. I'm not absolutely sure on the 2500.

21 Q. I thought you just told me a second ago --

22 A. I haven't saw the 2500.

23 Q. You worked on it a whole night, didn't you?

24 A. I didn't realize how badly I was injured. I didn't
25 go out and take measurements.

1 Q. You worked in the 2500 for the whole night, from ten-
2 thirty on the 21st to the morning hours, four in the
3 morning on the 22nd, isn't that right?

4 A. Yes.

5 Q. That is when you claim you had this accident, isn't
6 that correct?

7 A. That is right.

8 Q. Hadn't you worked in that 2500 before?

9 A. I may have.

10 Q. As a matter of fact, you worked in it just before
11 it, a day or two before, hadn't you?

12 A. I may have.

13 Q. Isn't that what your book shows, that you worked in
14 the 2500 the shift just before?

15 A. Not the shift before, no. I'm sure of that.

16 Q. Let's look. In this record that you keep you list
17 the job you are working and the locomotive number,
18 isn't that correct?

19 A. Yes.

20 Q. All right. Now, I show you your Exhibit Number 17,
21 that is your book where you kept the information for
22 the year 1971, right?

23 A. That is right.

24 Q. That is the year you claim you hurt your knee, right?

25 A. That is right.

- 1 Q. Now, I direct your attention to Monday, June 21st,
2 it shows that you worked on the 2500, right?
- 3 A. Yes.
- 4 Q. That is the tour of duty that you seek to claim that
5 this accident happened, right?
- 6 A. That is right.
- 7 Q. Let's look at the one immediately before it on
8 Saturday the 19th, that was the day that you worked
9 right before, right?
- 10 A. I was off one day, wasn't I?
- 11 Q. I asked you the last shift that you worked before
12 the 21st, you worked on Monday, you didn't come to
13 work on Sunday, is that right?
- 14 A. That is right.
- 15 Q. You were off that day. Did you work Saturday?
- 16 A. Yes.
- 17 Q. What engine did you use on Saturday?
- 18 A. 2500.
- 19 Q. The same one you used on Monday?
- 20 A. That is right.
- 21 Q. You knew where the emergency brake valve was located,
22 didn't you?
- 23 A. No, I didn't.
- 24 Q. You didn't?
- 25 A. No.

1 Q. Well, isn't it part of your responsibility to know
2 where the equipment is on this particular locomotive?

3 A. Not when I'm on -- when I'm running an engine I have
4 a valve in front of me.

5 Q. That is on the engineer's side?

6 A. That is correct.

7 Q. You said you were on the fireman's side, right?

8 A. Yes.

9 Q. There is an emergency brake valve on the fireman's
10 side, right?

11 A. Yes.

12 Q. That is a piece of safety equipment so that you can
13 stop the engine, right?

14 A. Yes.

15 Q. And you have told us that it was your custom to
16 switch on and off so that part of the time the
17 engineer worked one side, the fireman worked the
18 other side, then you switched?

19 A. Yes.

20 Q. That is the customary thing?

21 A. That is right.

22 Q. You would have been on the fireman's side for a
23 part of the duty on the 19th, would you not?

24 A. Yes.

25 Q. And you are unable to tell us today -- strike that.

1 You have gone back and taken pictures of the 2500
2 series, haven't you?

3 A. Not the 2500, the 2500 series, yes.

4 Q. That is what I asked you. You testified earlier
5 that all the brake valves are basically in the same
6 location, right?

7 A. Basically in the same location.

8 Q. It is a fact, isn't it, that the level at which the
9 angle cock is that shows in that picture is a
10 number of inches above the knee level, right?

11 A. No.

12 Q. It's not?

13 A. Not in all of them, no, they vary.

14 Q. It is in the ones that the pictures show, isn't it?
15 Isn't it in the picture?

16 A. May I see it?

17 Q. Right up -- just under the window level, isn't that
18 correct? I direct your attention to Exhibit 6.

19 A. Yes. Just above the door latch, yes.

20 Q. Right underneath the window sill, right?

21 A. Yes.

22 Q. Now, I want you to mark, if someone has a marking
23 device, I want you to mark the angle cock with an
24 A, and then put your initials where the angle cock
25 is.

1 A. You mean where the angle cock is put an A?

2 Q. Put an A.

3 A. All right.

4 Q. That is the actual valve, isn't it?

5 A. Yes, it is.

6 Q. All right. What goes down the side are referred to
7 as the pipes, is that correct?

8 A. That is right.

9 Q. All right. Put your initials opposite that, please,
10 Mr. Eggert.

11 A. (Witness marks exhibit.)

12 Q. Now, so the record shows, you marked Exhibit 6,
13 correct?

14 A. Yes.

15 MR. GRIFFIN: May I show this to the jury, your
16 Honor?

17 THE COURT: Yes.

18 (Photograph displayed to jury.)

19 BY MR. GRIFFIN:

20 Q. Now, Mr. Eggert, didn't you testify this morning
21 on your direct examination when you described a
22 version of this claim that you got up, that there was
23 some movement of the train, that you feel down against
24 the brake valve?

25 A. No, I didn't.

1 Q. Didn't you testify in those approximate terms this
2 morning?

3 A. That isn't -- this isn't how it happened.

4 THE COURT: That wasn't the question.

5 BY MR. GRIFFIN:

6 Q. Did you testify to that in those words, that your
7 accident happened when you were standing up to look
8 in some direction and there was some movement of
9 the engine and you fell down and went down against
10 the brake valve?

11 A. No, I didn't.

12 Q. You didn't testify to that, all right. Now, is it
13 not a fact that you have previously not only reported
14 on a number of occasions, but testified that the
15 contact between your knee was with this brake valve
16 lever where you have marked an A on Exhibit 6?

17 A. I can't say that. I don't know exactly where I hit
18 it. That's what it felt like to me.

19 THE COURT: Listen to the question. Read the
20 question, Mr. Noel.

21 (Thereupon the last question was
22 read by reporter.)

23 THE WITNESS: That could be.

24 BY MR. GRIFFIN:

25 Q. When you gave that testimony and made those reports

1 were you telling the truth?

2 A. Absolutely, to the best of my knowledge.

3 Q. You also said on those occasions, did you not, that
4 when this occurred you were turning in your seat?

5 A. I was turning in my seat? No, I was not.

6 Q. Isn't that what you said, isn't that what you testified
7 to?

8 A. No, I was not turning in my seat. The seat wouldn't
9 turn.

10 Q. We'll get into that in a minute. Mr. Semple showed
11 you Exhibit 15, which is an Erie Lackawanna accident
12 report form called OD-4, correct?

13 A. Yes.

14 Q. Now, you told us that some time later, around four
15 o'clock or so, you contacted the terminal trainmaster,
16 is that right?

17 A. About three-thirty, yes.

18 Q. You said he came and met with you, is that correct?

19 A. Yes.

20 Q. And was one of your purposes that you wanted to
21 report some occurrence?

22 A. No, this was his idea to come down.

23 Q. Well, wasn't it your purpose in contacting the
24 trainmaster to make a report of an accident or an
25 occurrence?

- 1 A. Yes, to notify him.
- 2 Q. And in the course of your notifying him you told him
- 3 what you claimed happened, did you not?
- 4 A. When he came down.
- 5 Q. All right. He wasn't there in the cab, was he?
- 6 A. No, he was not.
- 7 Q. Any information that he would record on his report
- 8 would have to come from you, is that right?
- 9 A. That is right.
- 10 Q. Now, did you report to Mr. R.W. Reich, the terminal
- 11 trainmaster, and I quote: "Turning around on seat of
- 12 Engine 2500 struck left knee on emergency valve
- 13 lever." Is that what you reported?
- 14 A. Undoubtedly, yes.
- 15 Q. You reported to the first person that you explained
- 16 this alleged accident to that you were turning around
- 17 on the seat of Engine 2500, correct?
- 18 A. Trying to turn around, I was turning around.
- 19 Q. You further reported that in the process of so
- 20 turning you struck your left knee on the emergency
- 21 valve lever, correct?
- 22 A. Correct.
- 23 Q. Now, this version of the claim that you were standing
- 24 and there was a movement of the train and you fell
- 25 in some respect, when was the first time that you

1 told anybody that version?

2 A. I told him what happened. I told him that I fell.

3 Q. Just a minute. When is the first time that you told
4 anyone in this case at any time the version that you
5 have testified to here today, namely, that you were
6 up and standing and there was some movement of the
7 train that caused you to fall?

8 A. I didn't mention slack action for the simple reason that
9 is an everyday occurrence with us.

10 Q. Do you understand my question?

11 A. Oh, yes, I do.

12 Q. When did you for the first time give a version that
13 you were out of your seat and standing up and there
14 was a movement of the train and you fell and allegedly
15 contacted this brake valve lever?

16 A. The first -- when I talked to my new attorneys I
17 told them what happened, and I mentioned this slack
18 action, and this to them was very important.

19 Q. The first time that you gave this version was when
20 you were in the office of your present attorneys, is
21 that right?

22 A. No, no, I have mentioned this before.

23 Q. Well, do you recall being asked that question back
24 in March of this year, when you first gave that
25 version?

1 A. (No response.)

2 MR. GRIFFIN: Has the examination before trial been
3 marked?

4 MR. SEMPLE: It is marked for identification.

5 THE COURT: Plaintiff's Exhibit 8.

6 MR. GRIFFIN: I will refer to it as Exhibit 8 then,
7 is that all right, your Honor?

8 THE COURT: Yes.

9 BY MR. GRIFFIN:

10 Q. What was the name of the first firm of attorneys
11 that you had in this case?

12 A. Weber & Weston.

13 Q. And approximately how long after this, after June
14 22, 1971, did you retain that firm?

15 A. I would say approximately a month, month and a half.

16 Q. Of course, the events of what you claim occurred on
17 June 22, 1971 were much fresher in your mind a month
18 after that date than they were in March of 1975, were
19 they not?

20 A. Yes, I suppose they were.

21 Q. And when you first went into the office of whoever
22 you contacted in Weber & Weston, you explained how
23 your claim occurred, did you not?

24 A. Yes.

25 Q. And they filed papers on your behalf, did they not?

1 A. Yes.

2 Q. And then later they had you sign written answers to
3 various questions in the case, written answers to
4 interrogatories?

5 A. Yes.

6 Q. Which we will ask you about a little later. You went
7 over the facts with them at that time, did you not?

8 A. Yes.

9 Q. Then at some time you discharged those lawyers, is
10 that correct?

11 A. That is correct.

12 Q. Then you retained new lawyers, correct?

13 A. That is right.

14 Q. Who was the new lawyer you retained?

15 A. The gentleman sitting right there.

16 Q. Mr. Lankes office?

17 A. Yes.

18 Q. In between Mr. Lankes and Weber & Weston there was
19 another lawyer in the case, right?

20 A. No, there wasn't.

21 Q. Never entered the case?

22 A. Never entered the case.

23 Q. Did you discuss it with some other lawyer?

24 A. Yes.

25 Q. Who was that?

1 A. Homer Peters.

2 Q. He is an attorney in Albany, New York, is that correct?

3 A. Yes.

4 Q. Did you meet with him?

5 A. Yes.

6 Q. Where, in Buffalo?

7 A. Yes.

8 Q. Did you go over all the facts with him?

9 A. No.

10 Q. You didn't go over any of the facts?

11 A. No.

12 Q. Although you met with him in Buffalo?

13 A. Yes.

14 Q. I want to ask you about this version of the accident
15 that you have today, and I am directing your attention
16 to Exhibit 8 which is the typed up transcript of the
17 testimony which you gave on March 11, 1975, correct?

18 A. Correct.

19 Q. Now, turning to Page 103 and 104, starting with your
20 now explanation about slack, starting on Page 103,
21 Line 17, were you asked this question and did you
22 give this sworn testimony on March 11 of this year:

23 "Q. Did you do anything to brace yourself for the
24 slack?"

25 Incidentally, slack, if there was any slack, slack is

1 a normal thing in railroad switching moves?

2 A. Yes.

3 Q. Page 103, Line 17:

4 "Q. Did you do anything to brace yourself for the
5 slack?

6 A. I grabbed the seat. When the slack come in it
7 threw me back and I grabbed the seat, but then
8 I went over against the bulkhead and went down.
9 It threw me down into the valve."

10 Was that your testimony then?

11 A. Yes, it was.

12 Q. So at that time you swore that you went down into
13 the valve?

14 A. I did go down into the valve.

15 Q. Okay. Those were your words, were they not, "down
16 into the valve."?

17 A. (No response.)

18 Q. I am asking you were those your words?

19 A. Yes.

20 Q. Listen to the next question. Were you asked this
21 question and did you give this answer:

22 "Q. Have you ever told anyone up to today this
23 version of what happened that night or morning?

24 A. No."

25 That was your sworn testimony then, right?

1 A. Well, if that is the sworn testimony or not, I have
2 said that.

3 Q. That is what you said when you were questioned on
4 March 11, 1975, right?

5 A. I see it.

6 Q. I asked you then, did I not, I said, "Have you ever
7 told anyone up to today -- today being March 11th --
8 this version of what happened that night or morning?
9 Answer: No." That was your testimony, right?

10 A. (No response.)

11 THE COURT: Have you answered the question?

12 THE WITNESS: I saw the "No."

13 THE COURT: Did you say no?

14 THE WITNESS: I must have.

15 BY MR. GRIFFIN:

16 Q. Was it the truth when you answered that question?

17 A. No, because I have discussed it.

18 Q. You answered it untruthfully then?

19 A. Yes, I did.

20 Q. How many other things and answers in this particular
21 transcript of your testimony are untruthful?

22 MR. SEMPLE: I object to that, your Honor.

23 THE COURT: Overruled.

24 THE WITNESS: What was the question?

25 BY MR. GRIFFIN:

1 Q. How many other answers in this sworn testimony that
2 you gave on March 11 of 1975 are untruthful?

3 A. I'm not aware of any.

4 Q. So this is the only answer in all the testimony
5 that you gave that you now say is untruthful or
6 incorrect, is that right?

7 A. That is right.

8 Q. Mr. Eggert, when you finish work on a locomotive
9 are you required as an engineer -- let me withdraw
10 that. As the engineer you are in charge of the
11 engine, is that correct, during your tour of duty?

12 A. That is right.

13 Q. And you are required to check out the equipment on
14 a locomotive, right?

15 A. Yes, that is right.

16 Q. When you finish a tour of duty, if there's any
17 repairs needed for the locomotive or any problems
18 with it, are you required to turn in a report?

19 A. Yes.

20 Q. What is the number of that report?

21 A. I'm not sure of the form number.

22 Q. And after you finished your tour of duty as the
23 engineer on N & W 2500 on June 19, 1971, did you
24 turn in a report as to any defects in that particular
25 locomotive?

1 A. June 19th?

2 Q. Yes.

3 A. There was no forms available.

4 Q. There were no forms available.

5 A. No forms available.

6 Q. So you didn't turn in any report of any problems
7 with locomotive 2500 after your tour of duty on the
8 19th, is that right?

9 A. There was nothing wrong with it, as far as I know,
10 but there was no reports either.

11 Q. Well, then let's forget about the reports. You
12 wouldn't have made a report because there was
13 nothing wrong with it, is that right?

14 A. No, that's not right.

15 Q. Isn't that what you said?

16 A. I make one out regardless if they are available.

17 Q. But there was nothing -- if you had a form, which
18 you now say you didn't have, you would have reported
19 no problems with N & W 2500, right?

20 A. No.

21 Q. What do you mean?

22 THE COURT: You mean yes, you would have made
23 such a report?

24 THE WITNESS: No, I would have put basic things
25 to have done to the engine that all engines

1 need after being out in the yard, check
2 sanders, supplies, et cetera.

3 BY MR. GRIFFIN:

4 Q. Well, check sanders, supplies, but in terms of any
5 specific problem with the N & W 2500 after it worked
6 on Saturday the 19th, you wouldn't have had anything
7 to report, is that correct?

8 A. Not to my knowledge, there was nothing wrong with
9 it.

10 Q. You say somehow you had a problem with the seat
11 turning or something like that when you used the
12 same locomotive on Monday, is that it?

13 A. That is right.

14 Q. You say there were no forms available?

15 A. No forms available in the Halstead Avenue office.

16 Q. You looked for forms?

17 A. Yes, I did.

18 Q. No forms were available, is that the idea?

19 A. That is right.

20 Q. Presumably no one would have been able to make engine
21 reports out there in the Bison Yard area on the 19th
22 and 20th, and so on, is that it?

23 A. That is right.

24 Q. If the railroad's records have forms for those
25 various dates -- strike that. Did you turn in any

1 report after you finished your duty on the evening
2 of the 21st and the day of the 22nd?

3 A. There was no forms again.

4 Q. Again no forms?

5 A. That is right.

6 Q. Was there anything to report that day?

7 A. Yes, there was.

8 Q. And what was that?

9 A. The same thing, sanders, this type of thing.

10 Q. So there was no difference on the 21st and 22nd as
11 compared to the 19th?

12 A. No difference.

13 Q. What direction do you say that you were traveling
14 at the time that you say you had this accident?

15 A. What direction were we traveling?

16 Q. Yes.

17 A. In a westerly direction.

18 Q. But the work that you were doing was generally in
19 an easterly direction, right, the tracks upon which
20 you were making switching moves were generally to
21 the east, is that correct?

22 A. We were making an eastbound move, yes.

23 Q. And when you would make an eastbound move, you
24 would shove cars into various tracks, which tracks
25 were generally east of Halstead Street, right?

1 A. Yes.

2 Q. And the front of the engine would be facing the
3 direction that you were doing the work, is that
4 correct?

5 A. No.

6 Q. It wasn't?

7 A. No.

8 Q. You mean you had -- as the engineer in charge of
9 this particular tour of duty that night, you had
10 the front of the engine facing away from the way
11 that you were doing most of your work?

12 A. That is right.

13 Q. That was your decision, was it?

14 A. Oh, no. We have no decision over which way the
15 locomotives are facing. We have asked on many
16 occasions to have them turned. They refused to
17 turn them because of the time involved.

18 Q. Is it not a fact -- is the short end of the locomotive,
19 is that the so-called front?

20 A. On this particular engine, yes.

21 Q. All right. And the short end of the locomotive --
22 do you claim here that the short end of the locomotive
23 was not facing east?

24 A. I do.

25 MR. GRIFFIN: May this be marked for identification?

(Photograph referred to was marked Defendant's
Exhibit 1 for identification.)

BY MR. GRIFFIN:

Q. Directing your attention to Defendant's Exhibit 1,
I ask you whether that is a picture of N & W Loco-
motive 2500?

A. Looks like it, yes.

Q. And on the left side we see the so-called short end,
do we not?

A. Yes.

Q. That is the front of the locomotive?

A. That is right.

MR. GRIFFIN: I offer this in evidence.

MR. SEMPLE: I have no objection, your Honor.

THE COURT: Without objection, Defendant's Exhibit
1 is in evidence.

(Defendant's Exhibit 1, previously
marked for identification, was received and
marked in evidence.)

MR. GRIFFIN: Does the Court care to see it?

THE COURT: No.

MR. GRIFFIN: May I show it to the jurors?

THE COURT: You may.

(Photograph displayed to jury.)

1 BY MR. GRIFFIN:

2 Q. Mr. Eggert, with Defendant's Exhibit 1 showing in
3 the foreground on the left side the front of the
4 locomotive, which seat would you have been sitting
5 in that night as your locomotive went back and forth,
6 the seat that would be closest to the front of the
7 locomotive or the seat that would be closer to the
8 back of the locomotive?

9 A. Closer to the front.

10 Q. Closer to the front. Now, do I understand that it
11 is your testimony that all night long, from the time
12 you went to work at ten-thirty until the time you
13 claim you had an accident, you remained continuously
14 in that particular seat?

15 A. Yes.

16 Q. And that would be all the while you were going back
17 and forth during the hours of work making the various
18 movements, correct?

19 A. Yes.

20 Q. And did you make it a practice to look in the
21 direction that you were traveling?

22 A. Yes.

23 Q. And so at some time you would -- strike that --
24 incidentally, this was June 22nd, was it a pleasant
25 summer evening?

1 A. It wasn't raining.

2 Q. The temperature would be typical for that time of
3 year, in the 70's or at least --

4 A. I couldn't say as to that.

5 Q. Of course, the cab of the locomotive generates a
6 bit of heat, does it not?

7 A. Not really.

8 Q. At that time of the year is it customary to operate
9 the locomotive with the side windows open?

10 A. There, again, it all depends.

11 Q. In the summer months, like June and July, don't
12 you gentlemen when you work keep those windows on
13 each side open?

14 A. Not necessarily. In the middle of the night it's
15 damp and the windows are shut.

16 Q. Did you have the windows open that night?

17 A. I don't believe I did.

18 Q. But there are windows on each side which you can put
19 your arm out and look, if you care to, is that
20 correct?

21 A. Put your arm out?

22 Q. Don't you sometimes -- isn't it customary to sit
23 with your arm out on the edge of the window sill?

24 A. Not my arm.

25 Q. Not yours, how about the engineer's, how about the

1 ore operating the engine?

2 A. He may be out there but I don't put my arms out
3 beyond the running gear of the engine.

4 Q. I'm not suggesting that you stick them out straight,
5 but don't you use the window sometimes for an arm
6 rest when the window is open?

7 A. Yes, but just the arm rest; beyond that point, no.

8 Q. Is there an arm rest right on the window sill?

9 A. That varies, some of them are --

10 THE COURT: Do you remember about the 2500?

11 THE WITNESS: No, I really don't. I don't remember
12 the arm rest too well.

13 BY MR. GRIFFIN:

14 Q. Here is your picture, Exhibit 1, Mr. Eggert, doesn't
15 it show -- you said this is the same type of arrange-
16 ment as the 2500, and does that show an arm rest right
17 on the window sill?

18 A. Yes, but these -- on the N & W they are indented into
19 the wall, they fit in, a different type.

20 Q. I won't belabor it any more, but when an engineer
21 or someone is operating an engine going into a
22 track, don't they look out the side window to get
23 directions, especially in the summer time?

24 A. No, not necessarily.

25 Q. Well, do they? You say "not necessarily," isn't that

1 a normal way to look for signals, that you lean out
2 the side window and you look down the track when
3 you've got ten, twenty cars ahead?

4 A. No.

5 (Defendant's Exhibits 2 and 3 marked
6 for identification.)

7 BY MR. GRIFFIN:

8 Q. Mr. Eggert, I direct your attention to Defendant's
9 Exhibit 3, which is a -- I ask you whether you
10 recognize that as a photograph of the inside of
11 the 2500 toward the fireman's side where the two
12 seats are, with one seat taken out so that the
13 emergency brake valve is in view?

14 A. Yes, that is the same setup as the 2500.

15 Q. Now, does the window with the arm rest appear in
16 that particular photograph?

17 A. Yes.

18 MR. GRIFFIN: I offer it in evidence.

19 MR. SEMPLE: Your Honor, I have no objection.

20 THE COURT: All right, Defendant's Exhibit 3 is
21 in evidence.

22 (Defendant's Exhibit 3, previously
23 marked for identification, was received and
24 marked in evidence.)

25 MR. GRIFFIN: May I show it to the jurors, your Honor?

1 THE COURT: Yes, you may.

2 (Photograph displayed to jury.)

3 BY MR. GRIFFIN:

4 Q. Now, as you sat in whichever seat you were sitting
5 in, Mr. Eggert, before the time you claim you hurt
6 your knee that night, you went back and forth over
7 Halstead Street and in and out of various tracks,
8 is that correct?

9 A. That is correct.

10 Q. And all the time you remained in the same seat?

11 A. That is correct.

12 Q. And when you sat in the seat that you were sitting
13 in what direction were you looking?

14 A. The seat I was sitting in?

15 Q. Yes. When you sat in the seat, if you were sitting
16 normally with the back, what direction were you
17 looking in, east or west?

18 A. That would be a westerly direction.

19 Q. That was west?

20 A. Yes.

21 Q. Now, you sat that way all night you say?

22 A. Yes.

23 Q. When you would move west which side do you say you
24 were on of the cab? Let's assume you are moving in
25 a westerly direction, assume that that is the case,

1 which side of the cab are you on, north or south?

2 A. South side.

3 Q. South side. So south would be to your left if you say
4 you were looking in a westerly direction, right?

5 A. Yes.

6 Q. And when you would move in a westerly direction in
7 connection with that movement -- those movements
8 that night, it would be -- you would look the way
9 you were going, right?

10 A. That is right.

11 Q. Now, when you moved east, you would turn around to
12 look east?

13 A. Turned around as much as I could to my left.

14 Q. Is that the way you say you did it all night?

15 A. That is the way I did it, you know, when I was just
16 making sure we were clear, there was nothing in our
17 way, when I was watching my side. The seat was
18 on an angle and I would look back like that.

19 Q. Did you not, as the fireman, look in the direction
20 you were traveling all times during your tour of
21 duty that night?

22 A. Yes, I looked in the direction I was traveling,

23 Q. And when you looked -- when you were traveling east
24 you were looking east, were you not?

25 A. That is right.

1 Q. All right. And you were looking east from the seat
2 that you were occupying, right?

3 A. That is right.

4 Q. And at the particular time that you claim that you
5 hurt your knee, you had occasion to look to the east,
6 is that right?

7 A. I was going to take signals from Mr. Kendall. Mr.
8 Kendall and I were going to relay signals across the
9 cab. Now, this is a different story.

10 Q. Now, you were going to take signals from Mr. Kendall?

11 A. We were going to relay signals back and forth.

12 Q. But I thought you testified you wanted to look to
13 see if anyone was down east on the ground because
14 Mr. Kendall couldn't see his ground men?

15 A. That is right.

16 Q. In order to do that you would have to look to the
17 east?

18 A. That is right.

19 Q. As you had done -- strike that. You had looked in
20 the direction when you pushed up in the various
21 tracks to the east by turning around to the left,
22 had you not?

23 A. I didn't have to communicate with the engineer at
24 that time.

25 Q. Pardon?

1 A. I didn't have to communicate with the engineer on
2 those moves.

3 Q. The engineer is right across the cab a few feet away?

4 A. Yes, that is right.

5 MR. GRIFFIN: I want to question the witness relative
6 to answers to interrogatories, your Honor.

7 THE COURT: This would be an appropriate time to
8 take a brief recess.

9 MR. GRIFFIN: All right.

10 (Thereupon the court was in recess
11 at 1:30 P.M.)

12
13 (Proceedings resumed, pursuant to
14 recess, commencing at 2:45 P.M.)

15 (Counsel present, jury present.)

16
17 T H O M A S W. E G G E R T , called as a witness
18 on his own behalf, and having been previously duly sworn,
19 resumed and testified further as follows:

20 MR. GRIFFIN: I wonder, if it please the Court, if
21 I might have the original answers to inter-
22 rogatories? I don't think it is necessary
23 to mark them as an exhibit, is it, if I
24 want to refer to them?

25 THE COURT: Which set?

1 MR. GRIFFIN: It is our interrogatories to the
2 plaintiff.

3 THE COURT: Do you want them both?

4 MR. GRIFFIN: I want the interrogatories and the
5 sworn answers of January 30, 1974.

6 MR. SEMPLE: There are two sets.

7 THE COURT: There are two sets. Hand them over.

8 CROSS EXAMINATION BY MR. GRIFFIN: (Cont'd.)

9 Q. Now, as you would sit in the seat, Mr. Eggert, how
10 much space would separate your legs from the side
11 wall or I guess you call it the bulkhead, how many
12 inches would separate your legs from the bulkhead
13 and the line of your legs?

14 MR. SEMPLE: Excuse me. Is this in the normal
15 position?

16 BY MR. GRIFFIN:

17 Q. As you were seated that night, how many inches were
18 there -- you said you were sitting in the front
19 seat?

20 A. Yes.

21 Q. Looking west?

22 A. Yes.

23 Q. Were you looking out the side window?

24 A. No.

25 Q. You didn't -- you never that night looked out the

1 side window?

2 A. Very seldom look out the side window.

3 Q. Did you ever lean out the side window to look down
4 the track that night?

5 A. No.

6 Q. Either way?

7 A. No.

8 Q. Was the window open or closed?

9 A. I would say it was closed.

10 Q. Closed all night?

11 A. Undoubtedly, yes.

12 Q. And as you sat in whatever position you were sitting
13 in, how much space separated your left leg from the
14 side wall of the cab of the engine?

15 A. I would say approximately five inches.

16 Q. All right. Now, did you then before you say you
17 had this accident turn to the right to get up?

18 A. Turn to the right to get up?

19 Q. Yes.

20 A. I didn't turn, I couldn't turn.

21 Q. My question is did you turn to the right to get up --
22

23 A. No.

24 Q. -- that night?

25 A. No.

Q. You didn't turn to the right?

1 A. I turned to the right -- I turned this way, I couldn't
2 get up because of the seat.

3 Q. Because of the seat?

4 A. Because of the back of the seat.

5 Q. Did you stick to the seat?

6 A. No, no. The back rest was out this way. Mr. Kendall
7 asked me --

8 Q. Don't worry about Mr. Kendall. Did you turn to the
9 right to get up?

10 A. I turned to the right to look to the right.

11 Q. Not to get up, just to look?

12 A. Eventually I got up, yes.

13 Q. Eventually you got up, and when you got up, when you
14 were in the process of getting up, were you facing
15 the engineer?

16 A. No.

17 Q. You were not?

18 A. No.

19 Q. Was it not your -- if you say that you were getting
20 up, wasn't it your intention to get up and move to
21 the right?

22 A. It was my intention to get up and move to the rear
23 seat --

24 Q. All right.

25 A. -- and sit side saddle.

- 1 Q. You weren't going to do that around to the left, in
2 that five inches?
3 A. No.
4 Q. You were going to step right out?
5 A. No, I was going to get up and walk around, turn and
6 walk around.
7 Q. Did you get up on your feet?
8 A. Yes, I did.
9 Q. Did you turn to the rear?
10 A. No, I didn't.
11 Q. Then you say somehow you fell back into this brake
12 valve, is that it?
13 A. No, no. I fell back into the seat. When the slack
14 come in I went to grab the seat, and when the slack
15 come in it threw me back, and I went up in the air,
16 and when I come down I come over against the bulkhead
17 and down.
18 Q. You say now it threw you into the seat?
19 A. I hit the back of the seat first.
20 Q. What did you hit the back of the seat with?
21 A. With part of my body.
22 Q. What part of your body?
23 A. I suppose the buttocks, I'm not sure. It threw me
24 over against the bulkhead.
25 Q. And you say you attempted to grab the seat, is that

1 right?

2 A. Yes, I did. I had hold of the back of it.

3 Q. Your buttocks contacted what part of the back of the
4 seat?

5 A. I would say the back rest.

6 Q. The back rest?

7 A. Yes.

8 Q. And were you east or west of the back rest at the time
9 your buttocks contacted it?

10 A. Was I east or west of it?

11 Q. Was your buttocks east or west?

12 A. West.

13 Q. Then you would have gone right back into the seat
14 that you supposedly came from?

15 A. It was on an angle. I hit the back rest. It threw
16 me over. I was up and it threw me over against the
17 bulkhead, then I went down.

18 Q. You went down?

19 A. Yes.

20 Q. After you went down you say you hit your knee?

21 A. On the way down I hit my knee.

22 Q. Against this valve?

23 A. Yes.

24 Q. Well, do you remember answering interrogatories,
25 which were various questions addressed to you, sometime

1 in early 1974?

2 A. I don't recall all those. I know I signed it.

3 THE COURT:

4 For the benefit of the jury, we have
5 talked about a deposition, we are now talking
6 about interrogatories, and these are two
7 things we have in trials all the time, where
8 in the deposition they have a right to have
9 a party appear before some stenographer and
10 be under oath and answer questions put to
11 him by the attorneys, and this is all taken
12 down and typed out, and that is the trans-
13 cript we talked about. Other times a party
14 can send through the mail, or otherwise,
15 written questions, interrogatories, and
16 then the other side has to answer those.
17 These are the two things we are talking
18 about.

19 BY MR. GRIFFIN:

20 Q Directing your attention to the answers to inter-
21 regatories sworn to January 30, 1974, is that correct?

22 A. Yes.

23 Q Is that your signature that appears there?

24 A. Yes, it is.

25 Q And under that, sworn to before a notary public, F.
Lambert Haley?

1 A. Yes.

2 Q. Now, did you claim as of January 1974, for example,
3 that you lost \$39,000 of earnings due to this claimed
4 accident?

5 A. Yes, I did.

6 MR. SEMPLE: Which one, Mr. Griffin.

7 MR. GRIFFIN: 17.

8 MR. SEMPLE: Which set of interrogatories? There's
9 two sets, I don't know which you are talking
10 about. Okay, I got it, I'm sorry. Excuse
11 me.

12 THE COURT: For the record, which one? Each
13 party defendant made interrogatories, and
14 each set was answered.

15 MR. GRIFFIN: Well, this would be in response to
16 Erie Lackawanna's Item 17.

17 THE COURT: All right.

18 BY MR. GRIFFIN:

19 Q. You claimed \$39,000, for example, of loss of earnings
20 as of January 1974, is that correct?

21 A. Yes.

22 Q. That wasn't true, was it?

23 A. No, it wasn't.

24 Q. Okay.

25 A. That information --

1 Q. Just a minute.

2 A. I'm sorry.

3 Q. Please, just answer my questions. Were you asked
4 in Interrogatory Number 4, were you asked this
5 question: "With respect to each of the persons named
6 in your answer to the preceding interrogatory -- that
7 is, the members of your crew -- what was his exact
8 location and in what activity was he engaged at the
9 time of the alleged accident?" Were you asked that
10 question?

11 A. I don't recall it, but I must have been.

12 Q. You answered it, did you not?

13 A. Yes.

14 Q. All right. Was this your sworn answer as of January
15 1974, read Number 4 with me, "The fireman, William
16 Kendall, was on the right side of the locomotive at
17 the controls. One of the switchmen was in the loco-
18 motive cab, and the conductor and the other switchman
19 were on the ground along the right side of the train."
20 Was that your answer?

21 A. That must have been but that's --

22 Q. That's not true either?

23 A. No, it's not.

24 Q. That is sworn to by you as of January 1974, correct?

25 A. That is correct.

1 Q. And at that time you swore that the -- who was in the
2 locomotive cab beside you and the fireman?

3 A. According to this, a switchman.

4 Q. And where did you swear that the two other ground men
5 were located, what side of the locomotive were they
6 on?

7 A. They are on the right side.

8 Q. They are on the right side?

9 A. Yes.

10 Q. Now, if this movement that you allege you were hurt
11 in was a movement to the east, pushing cars in onto
12 a particular track, the engineer's side -- or the
13 person operating the locomotive would be on the
14 right side and the ground crew would be on the right
15 side, isn't that correct?

16 A. That is correct.

17 Q. And it states in here and you swore that the other
18 switchmen were on the ground along the right side
19 of the train, did you not?

20 A. Yes.

21 Q. Incidentally, Mr. Eggert, making claims and filling
22 out claims in connection with accident claims is
23 nothing new for you, is it?

24 A. What do you mean "making out claims"?

25 Q. Well, this isn't the first time that you were in an

1 accident and had to make out papers, statements,
2 reports, and so on, to describe what occurred in an
3 accident?

4 A. No, it's not.

5 Q. You have had much experience in that respect, isn't
6 that true?

7 A. I don't know what you call much experience.

8 Q. Let's see. You had an automobile accident in the
9 early 50's, and there was a claim arising out of
10 that, wasn't there?

11 A. That was compensation. I claimed nothing. That's
12 what I was given.

13 Q. You had to make out a report as to how it occurred?

14 A. I imagine, I don't recall.

15 Q. In the late 50's, '53 or '56, you claimed that you
16 hurt your back in an automobile accident, and you
17 had to make out reports relative to that, did you
18 not?

19 A. No, there was no reports made out. I made no reports
20 out.

21 Q. You made no report whatsoever?

22 A. No.

23 Q. Did you make any claim?

24 A. No claim.

25 Q. In the late 50's, 1959 or '60, as appeared in Dr.

Godfrey's report today, did you not make a claim for an injury on the Crystal Beach boat?

A. Yes, I did.

Q. You had an attorney by the name of John Drury, right?

A. I can't recall the name.

Q. Were you represented in the late 50's and early 60's by an attorney in connection with an accident while you were working on the lakes?

A. Yes, I was.

Q. You don't remember the lawyer that represented you?

A. No.

Q. Where was his office?

A. I thought he was in Detroit.

Q. Didn't you see in Dr. Godfrey's file correspondence to Dr. Godfrey and to Dr. Buckley from a Mr. John Drury, an admiralty attorney in this community?

A. No, I didn't see that.

Q. Did Mr. Drury represent you?

A. I'm not certain.

Q. You have had to make out a number of reports for railroad accidents, isn't that true?

A. A number? I have had three accidents.

Q. You knew the importance of what you were swearing to back on January 30, 1974, did you not?

A. No, I didn't know the importance of it.

- Q. You knew that you were using these sworn answers as a vehicle to try to recover money in this case, did you not? You knew that?
- A. No, I wasn't doing that at all.
- Q. Didn't you know that these were answers to questions that were going to be filed with the Court and sworn to as part of your claim here?
- A. I was not aware of what that was.
- Q. Let's go on to some additional questions. Incidentally, what is your testimony today, do you say that you hurt your knee when you turned in the seat and hit the brake valve?
- A. No.
- Q. It didn't happen that way?
- A. No, it didn't.
- Q. If your case here was premised upon an injury while turning in a seat, your sworn testimony today is it never happened that way, is that right?
- A. I was turning to get up. I couldn't get up.
- Q. But it wasn't in the process of turning in your seat that you moved your left leg against any brake valve, is that correct?
- A. I was trying to get up and I turned.
- Q. No. You don't claim today that you were in the process of turning in the seat to the left and that you

contacted any part of your knee against the brake valve as you were turning to the left?

A. Not to the left, no.

Q. You now make a claim that you were standing up on your feet and somehow you were thrown because of a movement of the train, is that your claim?

A. That is part of it, yes.

Q. Now, you were asked a series of questions, interrogatories, as to how your accident happened and as to the basis for which you sought to blame your employer for this accident, right?

A. I was asked some questions.

Q. Now, were you asked Question Number 7: "State in what respect defendant Erie Lackawanna Railway Company failed to provide plaintiff with a safe and proper place to work." And there is an answer, Number 7, correct?

A. Yes.

Q. Now, please read to yourself Answer Number 7, and tell me if there is anything in Answer Number 7 that in any way refers to movement of the train.

A. Nothing as to the movement of the train.

Q. All right. Now, I refer you to Question Number 12, in which you were asked, "State each and every other act or omission to act on the part of the Erie

Lackawanna which plaintiff claims constituted negligence." And did you answer that "Please refer to the paragraphs above."?

A. I didn't type that up. I swore to it, I know.

Q. The information had to come from you, didn't it?
Your lawyer wasn't there, was he?

A. That information was written up by them.

Q. It wasn't written up by the Erie Lackawanna, was it?

A. No.

Q. You were represented by Weber & Weston, and F. Lambert Haley was the attorney in charge of the case, right,
is that correct?

A. That is correct.

Q. And you had explained the facts relative to your accident to your attorneys, Weber & Weston, right, you told us that earlier?

A. (No reponse.)

Q. You had explained the facts and circumstances as to how your alleged accident had occurred to your attorneys, Weber & Weston --

A. Yes.

Q. -- when you first talked to them?

A. Very obviously they don't know too much about rail-reading.

MR. GRIFFIN: I move to strike that.

THE COURT: That will be stricken.

BY MR. GRIFFIN:

Q. Didn't you explain the facts and circumstances relative to your accident to the attorneys, Weber & Weston, when you talked to them?

A. I explained it, yes.

Q. You told them everything that you felt was important to tell them, isn't that true?

A. Yes.

Q. You didn't hold any information back, did you?

A. Not that I can recall. I don't know of any reason I would.

Q. Now, when you were asked to state in Question 12, "State each and every act or omission to act on the part of the Erie Lackawanna which plaintiff claims constituted negligence.", it says, "Please refer to paragraphs above." Correct?

A. Yes.

Q. You have read over before you came into court those answers that you swore to on January 1974, have you not?

A. These?

Q. Yes. Not that copy, which is the original filed with the Court, but your attorneys have showed you a copy of it, your latest attorneys, right?

A. Yes.

Q. Now, is there any place in the charges that you make in this case, allegations of negligence or fault, is there any place in those sworn answers to those questions I read to you that in any way refers to a movement of the train?

A. No, there isn't.

Q. Is there any place in those sworn answers, Mr. Eggert, that refers to your falling in any respect?

A. I don't know.

Q. Please look at them and see. Read them to yourself and see if there is any place that makes reference to your falling or stumbling or going into a seat.

A. No.

Q. Mr. Eggert, were you here when Dr. Godfrey testified this morning?

A. Yes, I was.

Q. And did you hear his testimony that you denied previous problems with your knee, did you hear that this morning?

A. Denied previous problems with my knee?

Q. Did you hear Dr. Godfrey say that you denied previous problems with your knee?

A. I don't think Dr. Godfrey knew of the 1966 occurrence with the stiffness in my knee.

*Appendix A - Trial Record
Excerpts of Testimony of Thomas W. Eggert.*

Q. Obviously, if you denied it he didn't know. Did you hear Dr. Godfrey's testimony this morning that you denied prior problems with your knee?

A. I don't recall every saying that to him.

Q. I didn't ask you that. Did you hear his testimony --

A. No. I didn't hear that, no.

MR. GRIFFIN: May I hand this to the Court?

BY MR. GRIFFIN:

Q. It is a fact that you had prior problems with your knee, is that right?

A. Yes, I had problems with both of them.

Q. And you treated for that with Dr. Carfagna and Dr. Norton in East Aurora, did you not?

A. No, I didn't. I treated -- there was no treatment. There was no treatment at all. Dr. Norton was out of town and the man taking over was Dr. Carfaglia, or whatever his name is, and I went to him, and he told me --

Q. Well, you had problems with drinking, with your liver, with your chemistry in your body for a number of years, had you not?

A. I don't understand what you are implying.

THE COURT: He is asking you a question.

BY MR. GRIFFIN:

Q. Isn't it a fact that for a number of years, starting

as early as 1963, and continuing over the years, you have had a problem with your body chemistry, with aggravating that by drinking, problems with your liver, and other related problems that you saw Dr. Norton and Dr. Carfagna for, especially when you lived in East Aurora?

- A. Dr. Norton gave me shots, B-12, for my liver, yes.
- Q. Didn't you go into the hospital at the recommendation of these doctors -- let me check the date, please -- sometime in the fall of 1966 were you in the Buffalo General Hospital?
- A. Buffalo General Hospital? I don't recall ever being in the Buffalo General Hospital.
- Q. Didn't you have surgery by a Dr. Spier?
- A. You got the wrong -- no.
- Q. Did you ever have surgery in the Buffalo General Hospital?
- A. No.
- Q. As an out patient?
- A. No. What hospital, if I may ask again?
- Q. The Buffalo General Hospital.

(Defendant's Exhibits 4 and 5 were marked for identification.)

MR. GRIFFIN: I represent to the Court and counsel that I have had marked as Defendant's Exhibit

4 records subpoenaed from the office of Dr. Vincent Carfagna, and as Exhibit 5 records subpoenaed from the office of Dr. James Norton.

BY MR. GRIFFIN:

- Q. Now, I direct your attention, Mr. Eggert, to Defendant's Exhibit 4, which is a photocopy of the records of Dr. Carfagna relating to Thomas Eggert, 787 Martin Drive, East Aurora. Did you live there at some time?
- A. Yes.
- Q. Over what period of time?
- A. Oh, I would say four years, five years.
- Q. Now, as of July 23, 1966, did you complain to Dr. Carfagna that you had aching and stiffness of both knees, especially on flexion, that the left knee is more crepitant, but the right is more troublesome?
- A. I remember telling him about the stiffness of the knees, yes.
- Q. Did you tell him, under complaints, that your left knee was more crepitant, that you had some grating sensation in it that you could feel and maybe even hear?
- A. I don't recall that.
- Q. You don't deny it?

*Appendix A - Trial Record
Excerpts of Testimony of Thomas W. Eggert.*

- A. No, I don't.
- Q. Did you have no effusion present but a crepitant left knee?
- A. They both bothered me, both knees. When I went for the x-rays it was both knees.
- Q. You had had an old injury to your right knee, had you not?
- A. Yes, I did.
- Q. It had been bothering you for years, right?
- A. No, no, I haven't had any trouble with my knees outside of this occurrence when they got stiff.
- Q. Did you not, on September 17, 1966, say to Dr. Carfagna that you had a deep ache in your right knee related to an old injury?
- A. I may have. I didn't even realize that -- they haven't bothered me.
- Q. Were you given quadracep exercises for both knees by Dr. Carfagna?
- A. I don't recall any exercises but --
- Q. Continuing on. On or about October 7, 1966 did you have surgery, Dr. Spier, at the General Hospital, eight-thirty a.m., in the emergency room?
- A. I don't recall Dr. Spier. I don't recall ever being in General Hospital.
- Q. You never recall being in the emergency room?

- A. No, I don't.
- Q. Is it referred to in the record?
- A. I don't know. This is -- I don't know, I can't place a Dr. Spier or Emergency Hospital.
- Q. In the month of -- did you continue seeing Dr. Norton in 1968 through 1971 for various problems?
- A. Yes, I did.
- Q. For example, did you see him on August 30, 1971, just a few weeks after you claim you had this Erie Lackawanna accident, for problems with your left foot, lumps on the left side of your rib cage?
- A. Yes, I remember the lumps on the --
- Q. Were you treated for that?
- A. No, he said there was nothing to be concerned about, they are just fatty tissue, that was it.
- Q. So this grating sensation, the crepitus that we heard about this morning from Dr. Godfrey, you had experienced that particular grating sensation some time before 1971, isn't that correct?
- A. I had a grating sensation in my right knee, too, I have always had some sort of a grating sensation.
- Q. In the year 1970, the year before you claim an accident on the railroad, it was quite normal for you to miss any number of days work, was it not?
- A. I was off pretty near two months the first part of the

year because of bronchitis, and then I moved --

Q. That would take us through the month of February, right?

A. Yes.

Q. I'm looking at the book for 1970, moving into the month of March of 1970, you didn't work on Saturday the 14th, Sunday the 15th, Monday the 16th, Tuesday the 17th or Wednesday the 18th, is that right?

A. Yes.

Q. Continuing on in March, you didn't work on March 29th, Sunday; March 30th, Monday; March 31st, Tuesday; April 1st, April 2nd, April 3rd, April 4th, 5th and 6th, continuously on until April 19th, is that correct?

A. That was vacation, I'm quite sure.

Q. That was your vacation, is that it?

A. Yes.

Q. Then I direct your attention to May. You were off May 3rd, 4th, 5th and 6th, correct?

A. Yes.

Q. You then missed a day on -- you worked two days and you were off on Saturday the 9th, correct?

A. Yes.

Q. You were off the 15th and 16th, you were off the 19th, right?

- A. Yes.
- Q. You were off the 29th and 30th of May, 31st and the 1st, right?
- A. Yes.
- Q. In July you were off the 7th, you were off the 8th, you were off the 9th, is that correct?
- A. Yes.
- Q. You were off the 27th, 28th, 29th, 30th, 31st, and the 1st, 2nd, 3rd and 4th of August, correct?
- A. Correct.
- Q. You were off Saturday the 8th, 9th, 10th and 11th, right?
- A. Right.
- Q. You were off the 28th and 29th, you were then off the 31st, September 1st and 2nd, correct?
- A. Correct.
- Q. In November you were off the 11th, one, two, three, four days, you worked one day on the 15th, then you are back off again the 16th, 17th, 18th, worked two days, off two days, is that correct?
- A. Correct.
- Q. In December you were off from December 2nd through the 12th, right?
- A. Correct.
- Q. Look at 1971, moving into the month of April, you were

April 10th, 11th, 12th onto the 16th. You work one day and then you were off the 18th, 19th and 20th, is that right?

A. That is correct.

Q. May you were off the 28th, 29th, 30th, 31st and 1st, right?

A. Right.

Q. Isn't it true that after you went back to work -- you say you had this accident on June 22nd of 1971 when you were off for six months, right?

A. Yes.

Q. Took some trips during that time?

A. Went to the Poconos, once.

Q. And when you came back on the 4th of January, in the six months before you determined to have the surgery on your leg, you actually -- your work schedule -- you worked much more frequently than you did in the year 1970 and in 1971, is that correct?

A. I forced myself to.

Q. I asked you whether you worked more regularly six months after this alleged accident than you did in the year and a half before the date of it?

A. Yes, I did.

Q. All right. In the years -- strike that. In the years 1973 and '74 your earnings have been up in the four-

teen, fifteen thousand dollar level, have they not?

A. They have, yes.

Q. In 1970 you were down in the eight to nine thousand dollar level, right?

A. There was a little difference in our salary, in our scale, at that time, too.

Q. And a big difference in the number of days you were working, right?

A. I don't feel '70 was a fair year because I was sick, off for two months. I moved back to Buffalo, I was off for that.

Q. You have been in the hospital over the past few years for things totally unrelated to your knee problem, isn't that true?

A. Yes. Unrelated to the knee problem, yes.

Q. Other than that?

A. Yes.

(Defendant's Exhibit 6 was marked for identification.)

BY MR. GRIFFIN:

Q. The Erie Lackawanna provides a physician to examine and treat a person who is injured on the railroad, is that correct?

A. Yes.

Q. And there is an office at 1221 Clinton Street, Clinton

and Babcock, there is a small medical office available for examinations and treatment of certain sorts, short of hospital care, is that correct?

A. Yes, sir.

Q. And Dr. Samuel Militello, who is a physician in the private practice of medicine, has his office on Bailey Avenue, and he attends to people on behalf of the Erie Lackawanna and certain other railroads, does he not?

A. I believe he does.

Q. And did you -- was it your testimony that you went to see Dr. Militello sometime on the 22nd of June 1971, after you claim this accident occurred?

A. Yes, I did.

Q. And where did you see him?

A. I saw him at Clinton Street.

Q. 1221, right?

A. Yes.

Q. Do you remember what time of the day it was?

A. Not exactly. I believe it was early afternoon.

Q. It would have been say one, two o'clock, something like that?

A. I would say that.

Q. Within, oh, say ten hours from the time that this occurrence happened, is that right?

A. Yes.

Q. And did the doctor ask you what happened?

A. I don't know, I can't recall that.

Q. Did you tell Dr. Militello as to how the alleged accident occurred, and I quote, "I turned around to watch signals and I struck my left knee on an emergency brake valve." Did you tell him that?

A. I may have.

Q. Do you recognize this Exhibit 6 as a surgeon's report of personal injury?

A. I never saw that before.

Q. Do you recognize it, though?

A. What do you mean, do I recognize it?

Q. Well, let me ask you this. Is there anything after the printed words "State in patient's own words how the accident occurred," is there anything there that says that you fell, that you twisted, that there was a movement or jerk of the train or anything to that effect on this particular report?

A. No.

THE COURT: What report? Is that marked?

MR. GRIFFIN: Defendant's Exhibit 6, your Honor.

THE COURT: All right.

BY MR. GRIFFIN:

Q. So that we understand this, in the report to the

terminal trainmaster, the man that you saw within at least a few hours of the alleged accident, and in the report to the surgeon, Dr. Militello, who you saw approximately ten hours after the accident, in the sworn answers to interrogatories that you made in January 1974, no place in any of these reports or answers is there anything that says that you fell or there was a jerk of the train or anything like that, is that correct?

A. I didn't realize that was important at that time.

Q. My question was it isn't in any of those, is it?

A. No, it's not.

Q. At any time, from June 22, 1971, until you first saw the witness of this morning, Dr. Godfrey -- I think he said he first saw you some time in December of 1971 -- in between those two dates was there any time that you injured your left knee by twisting or turning?

A. Yes.

Q. There was?

A. Yes.

Q. That was at what approximate date?

A. I don't know. That was a month or two after -- a week or two after or something, I can't remember. Shortly after the -- I did it in my apartment,

Appendix A - Trial Record
Excerpts of Testimony of Thomas W. Eggert.

twisted my leg.

- Q. You would place the date of that particular event as some time perhaps in the month of July 1971, is that correct?
- A. Possibly. It wasn't too long after it happened.
- Q. You have often worked with road switching type of engines to do switching, is that correct?
- A. Yes.
- Q. You have worked with other types of engines to do switching, correct?
- A. Yes.
- Q. And there are no switch engines that you work with where the cab was right up in the very front of the engine with a window completely across the engine, was there?
- A. I don't know as I understand you.
- Q. You gave testimony early this morning about certain types of engines?
- A. Yes.
- Q. And it is normal that in switching engines, whether you call them road switchers or other types of switch engines, it is normal that the engineer has a view on the right side and the fireman has a view on the left side, is that correct?
- A. Well, that would depend on the direction.

Appendix A -- Trial Record
Excerpts of Testimony of Thomas W. Eggert.

Q. Let's --

A. I see what you mean. Yes, all right, I understand what you mean.

Q. Whichever direction you are going it is still right side and left side?

A. Yes.

Q. And the engineer -- it is customary that the controls are on the right side of the engine, is that correct, in terms of the head end?

A. Unless there are dual controls.

Q. Unless there are dual controls, all right. But it is normal, whether it be a long snout, so to speak, or a short snout up front, that in terms of the short distance, in terms of the short distance, there is going to be some blockage of vision to the left for the engineer and to the right for the fireman?

A. What type of locomotive?

Q. On a switching locomotive.

A. No. No, not necessarily.

Q. Can you give me any particular series of switch engine that you have worked with in the year 1971 where you didn't have that particular obstruction?

A. Yes.

Q. Which series?

A. 400 class.

Q. 400?

A. Yes. That is to the rear, there is no obstruction.

Q. But to the front --

A. No, to the front there is a hood.

Q. When it is going forward you've got a long hood out in front of you, is that right?

A. Yes, but it's low. It doesn't completely --

Q. But on the 400 series, when the engineer sits and somebody is standing at the left front step of the engine, the engineer can't see him, can he?

A. No, that is true.

Q. If someone is standing on the right front side the fireman can't see him, right?

A. That is right.

Q. That is, as you explained before, why you have an engineer and a fireman in this day when there is no firing literally to be done, so that you have eyes and lookouts on both sides, correct?

A. Correct.

MR. GRIFFIN: Your Honor, I think I am close to finishing. I do have some notes that I have to check. It will take me a few minutes.

I don't know what the Court's program --

THE COURT: We are going to go until four o'clock.

MR. GRIFFIN: If I can take a moment to check some

things.

BY MR. GRIFFIN:

Q. You don't claim that there was anything unusual about the speed of the train on the evening of June 22, 1971, do you?

A. No.

MR. GRIFFIN: I have no further questions at this time.

MR. SEMPLE: I have no further questions, your Honor.

THE COURT: All right. Mr. Eggert, was there also nothing irregular or unusual about the slacking in movement of the train?

THE WITNESS: Your Honor, this is something we deal with, you know, on a daily basis. I really -- we don't think too much about that.

THE COURT: Everytime you start up with a string of cars you have a car by car reaction as they stretch out?

THE WITNESS: Exactly.

THE COURT: As you stop the normal reaction of this slack is to run in and you get a progressive bumping that comes up and reaches the engine?

THE WITNESS: Exactly.

THE COURT: This is something that you expect in your switching operation?

THE WITNESS: Yes.

THE COURT: I have nothing further. Step down.
(Witness excused.)

THE COURT: Now, you indicated you want to read some depositions. You might as well start on that.

MR. SEMPLE: Your Honor, it is -- I think we may be able to finish it, it is only, I think, twenty some pages long.

THE COURT: This happens from time to time also, ladies and gentlemen, where someone's deposition has been taken, as I have outlined, where the person is called usually into some attorney's office and put under oath and asked questions and gives answers and these are taken down. Then in place of that person appearing in court and taking the witness stand, what he has said is read to you, as Mr. Semple will read now, he will read the questions and read the answers, and it is as much evidence in the case as if the man were on the stand. Obviously, you can't observe the man as he is testifying,

* * * * *

"

Q. When you didn't see the signal did you reduce your speed in any fashion?

A. I slowed down almost to a stop, yes.

Q. Then when you saw the signal then you started coming?

A. That's right.

Q. Now, when did Mr. Eggert let out a yell or what?

A. He said he hit his knee. I did not see him hit his knee, I was watching for --

Q. I take it you did not see him fall or hit his knee or whatever happened?

A. No, all I did was hear him.

Q. Well, did he have any conversation with you about what happened?

A. He told me he hit his knee on the brake valve there. He was rubbing it I know and he was uncomfortable, but that's all.

Q. You did continue to operate the engine for the rest of the day?

A. I don't know. You are talking about a long time ago. I can't recall.

Q. Do you recall about the approximate time that this happened?

A. No, I have no idea what it is.

Q. All right. You say he hit his knee on a brake

" valve, would that be the emergency brake valve?"

THE COURT: Skip to --

MR. SEMPLE: Down to Line 19?

THE COURT: Yes -- no. I was thinking the
witness gave an answer on 12 --

MR. SEMPLE: All right. Okay, I will read
Line 9.

"Q. He told you he struck his knee on the brake
valve?

A. Yes.

Q. How many brake valves you got on that engine?

A. Got one on the engineer's side.

Q. Any other?

A. You only got one emergency brake valve on an
engine.

Q. Is there any on the fireman's side?

A. Yes.

Q. All right. Now, these brake valves are open
or are they guarded?

A. They are open.

Q. They are open?"

MR. GRIFFIN: Just a minute. I would request
and move that the reading be resumed
At Page 26, Line 2.

MR. SEMPLE: Your Honor, I would request that

I be permitted to continue reading on Page 23 from Line 23 onto Page 24, Line 5, as the photograph referred to as Plaintiff's Exhibit 2 for identification in the deposition is Plaintiff's Exhibit 2 in evidence in the courtroom, and then I would --

THE COURT: Plaintiff's Exhibit 2 is already in evidence here.

MR. SEMPLE: Yes, your Honor, that is the exhibit referred to --

MR. GRIFFIN: The context of the questioning, however, is different.

THE COURT: I can recognize that, and inasmuch as Plaintiff's Exhibit 2 is in evidence in court, we have testimony about it, we don't need to read the part of the deposition that has to do with it, and there is other material there by reference that I have already, on the foundation that we have in the case thus far, ruled out. So skip to 26, Line 2.

MR. SEMPLE: Thank you, your Honor.

"Q. Well, then, after he complained to you about his knee hitting the brake valve, you didn't see the accident actually, did you?

*Appendix A - Trial Record
Excerpts from Deposition of Gerard Lankes.*

- A. That's right.
- Q. What did you do then?
- A. Just kept on working.
- Q. Well, did you go to lunch at a certain time?
- A. I don't recall.
- Q. You don't know if this happened before or after lunch then?
- A. No.
- Q. Do you recall what hours you were working that day, was it eleven to seven or what?
- A. I don't know. I believe it was ten-thirty.
- Q. Ten-thirty to six-thirty?
- A. I believe so.
- Q. It was the last trick, is that correct?
- A. Known as the last trick, yes, sir.
- Q. Well, did he continue to work through the night with you?
- A. Yes.
- Q. Did he talk about or have any further conversation about his knee?
- A. I know he was having problems, he was rubbing his knee, that's it.
- Q. I take it you were the fireman, you didn't make any accident report of this?
- A. No, I did not.

"

Q. But at the time you were at the controls, the throttle?

A. That's right.

Q. When this accident or this incident happened, right?

A. Yes.

Q. Now, prior to your getting into the engineer's seat to run this engine, do you also have one seat on the engineer's side?

A. Yes.

Q. That is also a swivel effect --

A. Yes.

Q. -- is it?

A. Yes.

Q. So you can look forward and reverse yourself and look to the back?

A. Yes. On this type, yes.

Q. On this ELCO 2500?

A. Yes.

Q. But there are two seats on the fireman's side?

A. Yes.

Q. Had Mr. Eggert run the engine earlier that night, to your knowledge?

A. That I don't know. Usually we take turns, but I don't recall.

Q. Did it ever become necessary at an earlier time

"

when you were on the fireman's side that you had to reverse yourself in any of these seats, if you remember?

A. I don't remember.

MR. LANKES: Okay. That is all."

THE COURT: All right. We will recess at this time and you, the members of the jury, will come back tomorrow at nine o'clock and go down to your room as usual. Now, I didn't admonish you earlier about not talking about the case among yourselves and keeping an open mind because we are just getting the evidence in, but I do that now and, most importantly, don't talk with anyone else. If anyone makes any effort to talk with you about the case, let me know immediately. Now, I take it that that hasn't happened at this point. If it has, I will ask you to let me know. So I will excuse you at this time until nine o'clock tomorrow morning.

(Jury exited the courtroom at 4:10 P.M.)

MR. GRIFFIN: May I proceed, your Honor?

THE COURT: Yes, sir.

MR. GRIFFIN: May it please the Court, the plaintiff

having rested, the defendant respectfully moves for a directed verdict and judgment of dismissal of the complaint on the ground that there is a complete failure of proof of any cause of action whatsoever asserted in the pleadings in this case. May I just say preliminarily, your Honor, if there was ever an FELA case that I very sincerely feel should be thrown out, and there is such an absence of proof, it is this particular case.

It started out in 1971, this plaintiff claimed that he was sitting in a seat, and he moved to look --

THE COURT:

Now, you are getting into a phase -- I know that this is in the case very much, but you are getting into an area of credibility that the jury's got to decide. You've got to take really the most that he said, regardless of when he said it, as far as the evidence before me.

MR. GRIFFIN:

What I was getting to, your Honor, was that he started out --

THE COURT:

I understand.

MR. GRIFFIN: -- with a claim, and continued and progressed

a claim of sitting in a seat and turning, and now he has withdrawn that. That is the point that I make. He expressly --

THE COURT: That is a question for the jury.

MR. GRIFFIN: Well, no, I disagree. If the plaintiff says, 'The accident didn't happen the way that I always claimed it happened,' then the only proof -- there is a complete absence of proof on that theory, and he controls that, your Honor. The jury can't reject his testimony.

THE COURT: If I had held plaintiff to the literality of the original pleadings and of the original interrogations, and so forth, and had gone along with your objection that this new story, so-called, could not be interjected in the case, yes, you would be perfectly right, but I have not gone along with you, and I have allowed him to state what I will call a new version, and which is a different version from what he started with, but that is in the case.

MR. GRIFFIN: Well, your Honor, I am going to go to that and show why that is no proof of negligence in a moment. I just wanted to

point out that the claim that he has had for years in this court, the way that he reported it, and the way he described his accident, the way he pleaded it, the way he answered interrogatories is removed from the case. So there is no claim that his movement and coming in contact with the brake valve by reason of being on the seat or turning in the seat, that isn't in the case. He, himself, by his own testimony has removed it. Now --

THE COURT: My job is not to say what a jury will do, but what a jury can be permitted to do.

MR. GRIFFIN: I'm saying that they can't accept that because he has withdrawn it by his own testimony. Now, what has he testified to? He has testified that he stood up and that there was some movement of the train and he fell. Now, he fell against a device which is a normal, proper, necessary device. He hasn't offered any testimony to show that these emergency brake valves shouldn't be there. He offered no testimony as to unusual speed. By his own testimony there was a perfectly normal speed. By his own testimony,

even if you accepted his version there was slack, it was a perfectly normal situation on the railroad that he fully expected, so where is the negligence? He never pleaded any such negligence, but your Honor has determined to let him go, so to speak, relative -- incidentally, the prejudice is apparent because, you see, the deposition of the fireman, the other witness in the case, was taken before the deposition of the plaintiff and before that version, so there was no reason to interrogate him, that fireman, on examination as to whether there was any unusual movement or the man fell in any respect.

THE COURT: The plaintiff, himself, said flatly in answer to my question that there was no unusual or unexpected movement.

MR. GRIFFIN: All right.

THE COURT: So we have that in the case.

MR. GRIFFIN: We have that, and in response to my question he said the speed was perfectly normal.

THE COURT: Nothing wrong with the speed.

MR. GRIFFIN: So where is there any basis in this

evidence, even if you let him go off on his new version, where is there any basis to say we were negligent? There is none.

THE COURT:

I have kept out of the case thus far because it hasn't been properly presented, if it could be, and I'm not saying anything against Mr. Semple because some things just are not provable, namely, whether or not it is reasonably expected that they put some guards around this emergency valve, that is not in the case. Now, the only thing that is in the case, the only thing I want you to deal with, is the question of the seat, because here we have a movement that was not in any way unusual, the equipment in the cab, other than the seat, is not in any way unusual, and all that we have to be dealing with is the circumstance that Mr. Eggert got up out of that seat, as for any reason he had a right to do, the jarring was not unexpected, he put his hand back on the back of the seat to hold himself against that when, of course, he could note the slack was running in, but he fell back, hitting his buttocks against the back of

the seat which, because of the eight or ten inch divergence counter clockwise, had an effect, he said, of angling him -- on his reaction to going back against the seat -- angling him off to the left side of the cab and making him hit his knee against the emergency brake valve. Now, that is the totality of what they have in the case.

MR. GRIFFIN: If you accept that, your Honor. The present --

THE COURT: I am saying the jury can accept that.

MR. GRIFFIN: The presence of the seat or anything in that cab is a mere coincidence to an occurrence. It is not in any respect a cause of the occurrence that he seeks to recover for. Whether he fell against a seat that was turned one way or the other way, whether he fell against the brake valve or against the bulkhead or the floor, it is merely the physical situation that was there and had nothing to do with the operative cause as to why he allegedly fell against it in the first place. He has now chosen to go off on a movement theory and that he fell over because of some movement

which he said is normal movement.

THE COURT:

He doesn't even say -- I don't know if he could -- but he doesn't even say that it is really unusual, although he reached out to the back of the seat with his hand, that it would be unusual in this motion that he might be thrown down, and he doesn't even say that is wrong. All he says is wrong is being thrown down, the angle of the seat cocked to the left and threw him to the left against the emergency valve. All he is saying is that there is something wrong with the seat because he couldn't turn the seat.

MR. GRIFFIN:

That's got nothing to do with the accident. That is after an alleged accident. Are we going to say that because he hit himself there, rather than on something else, is that an inference of negligence?

THE COURT:

I have no problem with saying that up to that point nothing is any showing of any accident, in the sense we take it, or any negligence up to that point. The only question is is there some negligence in the seat itself. If it is not there, it

is nowhere.

MR. GRIFFIN: What is the accident? Given the most generous inference on his proof, what could the accident be? That he fell.

THE COURT: Against something which, because of malfunctioning he would say or not operating, had an unusual effect of throwing him off to the left against the emergency valve.

MR. GRIFFIN: I don't think --

THE COURT: If that is not in the case there is nothing.

MR. GRIFFIN: I don't even think that is in the case. It has nothing to do with -- he allegedly fell, that is his claim. Now, the fact that he -- there is no testimony or indication that he wouldn't have fallen against something.

THE COURT: That is what I say.

MR. GRIFFIN: His knee would have contacted something, there's no question about it.

THE COURT: I don't know whether his knee would have contacted something, but he is not saying here that there is anything unusual with the bumping, in which he hangs on to avoid falling. I'm sure that he never has

said on the stand that he never has fallen in any slack running in situation. I am sure, you know, that from time to time happens and he hasn't said to the contrary, but he falls in this situation against a chair which he says was not operating, which consequently was cocked eight to ten inches counter clockwise, which had an angularity then which when he fell against it would throw him in a reactive force back to the left and against the valve. That is his story, if there is anything.

MR. GRIFFIN: I must say, your Honor, that I did not any place see testimony or even the inference that the mechanics of the ultimate fall were in any way contributed to by the particular positioning of the seat.

THE COURT: You so stated.

MR. GRIFFIN: But in any event, even if you argue that, if one person thinks they can find that in the evidence, you know. Of course, he testified twice that he fully inspected the engine and reported nothing wrong, and wouldn't have reported anything wrong.

THE COURT: Here it is a question of believability,

which is not my chore.

MR. GRIFFIN: But, your Honor, he has chosen to present a claim of a fall and the issue is what caused that fall in a cab, and is there any evidence of negligence which caused that fall in the cab, and there isn't. I say that is his case, and he stands or falls on it, and anything else would, you know -- whether he would have done this or that, it just -- that is the accident. The operative facts as to what produced the mechanism of the fall antecedes anything about a seat or anything like that, and that is what we are dealing with, and there is no evidence that that was produced in any respect by any negligence.

THE COURT: Well, I agree with you as to the no showing of any negligence in anything that produced Mr. Eggert's fall back against the seat. Up to that point he is bereft of anything that I could permit to go to the jury. Now, he has fallen, through no negligence, against something which he says was negligently non functioning and was angled in a position that threw him reactively

off to the left against the side wall of the engine and against the emergency brake valve. Now, is there anything in that that I should let go to the jury?

MR. GRIFFIN: Absolutely not, your Honor. His own testimony was that he grabbed onto the back of the seat. The seat is obviously a round thing, a round situation. The back of the seat he says he used to aid himself, it wasn't something that was adverse, it was helpful to him relative to his fall.

THE COURT: A necessary implication is that he normally would do that with the slack running in.

MR. GRIFFIN: Or course, grab onto the seat. Whatever position it was in he would grab onto it.

THE COURT: If he were seated he wouldn't bother with it, he wouldn't have the need. If he is standing or walking or doing something, he has to hang onto something to keep the jolt from the slack running in from throwing him around and hurting him.

MR. GRIFFIN: Absolutely.

THE COURT: Now, as I say, he doesn't say to the contrary, and I think it has to be taken

as true in the case that from time to time, in spite of this, that he is thrown around or back, he doesn't say to the contrary, but being thrown down this time, he is thrown against the back of a seat that he says was in a cocked position because it wouldn't or couldn't turn, and consequently then reactively threw him not back, forward or anything but off to the left against the wall of the engine, which is five inches away from his left knee as he was sitting, and he says against the emergency valve.

MR. GRIFFIN: I don't see any negligence in that, your Honor.

THE COURT: Is there anything in the case that would show any negligence on the part of either railroad in the non functioning of the seat?

MR. GRIFFIN: Absolutely not, your Honor. That has nothing to do with it. At best, the position of the seat came to his aid, to try to hold onto the thing, and has nothing to do in a causative sense in any respect, in whole or in part, with his accident. In the complete absence of this, I sincerely feel there is nothing for a jury to speculate on here.

THE COURT: Let me hear what Mr. Semple says under the circumstances.

MR. SEMPLE: Your Honor, in this particular case we are talking about negligence prior or other than the seat, and we've got a situation here where the plaintiff testified, and also in the deposition of the fireman, Mr. Kendall, who was operating this engine claims, and Mr. Kendall says in his deposition, that he lost sight of the crew. Mr. Eggert during his testimony on the stand states that when you do lose sight of a fellow crew member the move is supposed to stop.

THE COURT: Which he knows, normal operation.

MR. SEMPLE: He knows but Mr. Kendall, instead of stopping the engine, throttled it down, he didn't stop. There is no testimony that he stopped. The testimony is that the engine was going four or five miles an hour.

THE COURT: If you bring a train from eight miles an hour down to four or five miles an hour, you are subjecting it to a less healthy jolt from the slack running in than if you bring it from eight miles an hour to zero. The more you bring it down, the faster the

slack will run in and the larger the jolt.

MR. SEMPLE: Okay. If we take that, that Mr. Kendall was doing as much as he should have done in this instance --

THE COURT: Maybe not as much, but the fact he didn't do as much was even helpful to Mr. Eggert's situation. If he had done more the jolt would have been more severe.

MR. SEMPLE: Perhaps Mr. Eggert, if that was the case, would never have been out of the seat and we wouldn't be in here today. My feeling, as far as this defective seat is concerned, this is a -- Mr. Griffin claims there is no negligence in a defective seat -- here is a man who is -- you know, the seat as a matter of the usual course of things turns. Now, these seats will turn all the way around, and instead of getting out of the seat, he could have turned the seat around. Okay. Now, even in this case where he did get out of the seat --

THE COURT: His testimony was that he wanted to get up to go to the rear seat.

MR. SEMPLE: Right.

THE COURT: So no matter if that chair could have

turned around one hundred and eighty degrees, he still would have had to stand up and move to it.

MR. SEMPLE: That is not necessarily so. He could have turned around in this instance and looked out the back window like that without having to get up.

THE COURT: He said he moved to the rear seat because he was trying to establish some communication with the fireman who was over on the north side of the cab and running the train, and who asked Mr. Eggert a question and had to reask the question, and Mr. Eggert was moving back into the rear seat to establish this communication.

MR. SEMPLE: That is right, so he could face in that direction, and the way the seat was cocked he couldn't do that. If the seat weren't cocked and the seat swiveled, all he would have had to do is swivel the seat and face the engineer and to look out the back. In any case, if we take the fact it was the seat that was the mechanism or contributed to throwing Mr. Eggert into the bulkhead, if this seat was in a

straightforward position, which it might have been had the seat been working properly, he might have just fallen back into the seat and stayed there. Here is a man who didn't fall against the flat part of the seat, he fell against the corner, and this is what threw him into the brake valve, and I think that is the negligence in the case. Mr. Eggert, we admit has testified that slack action is a common occurrence on the railroad, there is no question about that. I don't think there is any dispute about that, as Mr. Griffin has said and as the Court has said, the whole thing hangs on this defective seat. I think it is for the jury to determine whether or not, if the seat had been in a proper working condition or if he had been able to sit in the back seat as he usually does, whether the whole thing would have happened.

THE COURT: All right. I will have to make up my mind. I will let you know. You will be at home?

MR. SEMPLE: Yes, your Honor.

THE COURT: You will be at home, Mr. Griffin?

MR. GRIFFIN: Yes, your Honor. Oh, I do have a
community meeting which --

THE COURT: What time are you going to that?

MR. GRIFFIN: I am required to leave about seven-
thirty.

THE COURT: I will let you know before then.

MR. SEMPLE: Thank you.

MR. GRIFFIN: Thank you.

(Thereupon the court was in recess at
4:30 P.M.)

* * * * *

PROCEEDINGS OF OCTOBER 30, 1975, COMMENCING AT 9 A.M.

(Counsel present, jury absent.)

THE COURT:

Well, as you both know via telephone calls which came to you last evening, I have reached a decision that the defendant's motion to dismiss the action for failure to prove the cause of action should be granted, and that is what I do at this time. By considerations that were outlined as we argued and talked about the motion yesterday afternoon at the conclusion of the plaintiff's case, I was at that time bothered a bit about the aspect of a chair, whether or not there was any negligence there, but I finally came to the conclusion in my own mind that there was nothing upon which the jury could determine that there was any negligence in that aspect. Consequently, even under the FELA, which allows a verdict if there is some negligence, there hadn't been a showing of any. So that we have called off the jury, and they are disposed of.

* * * * *

Appendix B
Summons and Complaint.

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-64)
(Formerly D. C. Form No. 65a Rev. (6-49))

United States District Court

FOR THE
WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. _____

THOMAS W. EGGERT
25A Garden Village Drive
Cheektowaga, New York

Plaintiff

v.

ROCHESTER & WESTERN RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

ERIE LACKAWANNA RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon

WEAVER & WESTON

[Signature]

plaintiff's attorney, whose address **1300 Genesee Building, Buffalo, New York 14202**

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Clerk of Court.

Deputy Clerk.

Date:

[Seal of Court]

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

Appendix B
Summons and Complaint.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT
25A Garden Village Drive
Cheektowaga, New York

Plaintiff

-vs-

COMPLAINT

NORFOLK & WESTERN RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

Plaintiff demands
Trial by Jury

ERIE LACKAWANNA RAILWAY COMPANY
1221 Clinton Street
Buffalo, New York

Defendants

The Plaintiff, THOMAS W. EGGERT, appearing by WEBER & WESTON, F. LAMBERT HALEY of counsel, his attorney, says:

1. This action is being brought against the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, pursuant to the provisions of the Federal Employer's Liability Act, Title 45, U. S. Code, Section 51, et seq.

2. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, is and was at all times mentioned herein, a corporation duly organized, created and existing under and by virtue of the laws of the State of Delaware and is and was at all times mentioned herein, a common carrier engaged in interstate commerce by railway.

Appendix B
Summons and Complaint.

3. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, is and was at all times mentioned herein, a corporation duly organized, created and existing under and by virtue of the laws of the State of Virginia and is and was at all times mentioned herein, a common carrier engaged in interstate commerce by railway.

4. On or about the 22nd day of June, 1971, and for some time prior thereto, the Plaintiff was employed by the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, in furtherance of that Defendant's business in interstate commerce.

5. On or about the 22nd day of June, 1971, the Plaintiff was assigned as a member of the crew of the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, as a locomotive engineer on a locomotive engine, number N & W 2500, owned by the Defendant, NORFOLK & WESTERN RAILWAY COMPANY, which engine was bailed by the Defendant, NORFOLK & WESTERN RAILWAY COMPANY, to the Defendant, ERIE LACKAWANNA RAILWAY COMPANY; the Plaintiff's said employment consisted in the operation of said engine in the switching of cars owned by both Defendants, in furtherance of the Defendants' business in interstate commerce.

6. By virtue of the negligence of the Defendants, NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY, its agents, servants and employees, with respect to the careless and reckless operations of the so-called "Bison Yard", the failure of the Defendants to maintain the railway locomotive in a proper working condition, the failure of the Defendants to provide the Plaintiff with a safe and proper place to work, the

Appendix B
Summons and Complaint.

failure of the Defendants to properly inspect the locomotive, the failure of the Defendants to warn or advise the Plaintiff of possible hazards to his health and safety, the failure of the Defendants to comply with the Federal Safety Appliance and Equipment Act, the failure of the Defendants to comply with the applicable Federal laws, the failure of the Defendants to provide the Plaintiff with a new engine free of hazardous and unguarded equipment and devices, and ordering the Plaintiff to work with faulty equipment, the Plaintiff was caused to suffer severe, painful and permanent injuries and has been and will be caused to lose time from his railway employment and to incur and pay expenses for reasonable hospital and medical care.

WHEREFORE, the Plaintiff demands judgment against the Defendants, NORFOLK & WESTERN RAILWAY COMPANY and ERIE LACKAWANNA RAILWAY COMPANY, in the sum of THREE HUNDRED THOUSAND DOLLARS (\$300,000.00) together with the costs and disbursements of this action.

Dated: Buffalo, New York
July , 1973

Yours, etc.

WEBER & WESTON by
F. LAMBERT HALEY, of counsel
1300 Genesee Building
Buffalo, New York 14202
(716) 852-4480

Appendix C

Plaintiff's Answers to Interrogatories.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

ANSWERS TO
INTERROGATORIESCivil Action No.
1973-370

For DEL

The Plaintiff, for his answers to the Defendant's interrogatories, alleges as follows:

1. June 22, 1971 at approximately 2:30 a.m. in the cab of NORFOLK & WESTERN Engine No. 2500 in the Bison Yard of the Defendant, ERIE LACKAWANNA RAILWAY COMPANY.

2. The Plaintiff was seated on the front seat of the locomotive cab on the left side. He attempted to turn to the right and the seat did not swivel as it should have. The Plaintiff attempted to arise from the seat and his left knee struck an unguarded emergency air brake valve.

3. The job classifications of the Plaintiff's fellow crew members who were working with him at the time of the accident, were fireman, conductor and two switchmen. The fireman was named William Kendall, but the names and addresses of the other crew members are not presently available to the Plaintiff.

4. The fireman, William Kendall, was on the right side of the locomotive cab at the controls. One of the switchmen

was in the locomotive cab and the conductor and the other switchman were on the ground along the right side of the train.

5. Among other things, the Defendant, ERIE LACKAWANNA RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.

6. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to properly maintain the seats in the said locomotive and also failed to provide a guard or safety device over the emergency brake valve.

7. Seats of the locomotive cab did not swivel or turn as they should have and the pipes and the valve and handle of the emergency air brake protruded out into the space which the Plaintiff occupied while working in the cab.

8. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to warn or advise the Plaintiff of the conditions described above.

9. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, failed to provide the Plaintiff with safe equipment and did order the Plaintiff to work with an unsafe engine, knowing that said engine was unsafe. The Defendant failed to properly inspect the said engine and failed to dispatch any mechanics, car

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Appendix C
Plaintiff's Answers to Interrogatories.

repairmen or other employees to repair or rectify the conditions.

10. The Defendant, ERIE LACKAWANNA RAILWAY COMPANY, violated the provisions of 45 USC 23 and failed to comply with all applicable provisions of every federal, state and local law, rule or regulation pertaining to the operation and maintenance of railroad locomotives.

11. The Yardmaster in the West End Tower of the Bison Yard

12. Please refer to paragraphs above.

13. The Plaintiff sustained an internal derangement of the left knee joint with chondromalacia patellae and degeneration of the medial meniscus, resulting in weakness and instability of the left leg.

14. The injuries the Plaintiff's left knee sustained are believed to be permanent and progressive in nature.

15. For the past five (5) years the Plaintiff has been employed by the ERIE LACKAWANNA RAILWAY COMPANY, 1221 Clinton Street, Buffalo, New York. The Plaintiff's daily rate of pay fluctuated between \$50.00 and \$150.00 depending on the hours worked, mileage traveled, overtime and allowances.

16. The Plaintiff was incapacitated from work from the date of the accident until about January 4, 1972. Then again from about June 14, 1972 to January 4, 1973.

He has continued to lose time from work on many

Appendix C

Plaintiff's Answers to Interrogatories.

occasions since he returned.

17. The exact amount of earnings the Plaintiff has lost from his job at the ERIE LACKAWANNA RAILWAY COMPANY cannot be stated at this time but it is approximated to be \$39,000.00.

18. The Plaintiff was confined to the hospital for 12 days, to his bed for approximately 4 weeks and to his home for a period of approximately 5 months except for occasional outings and visits to his doctor.

19. (a) hospital expense	\$1,146.15
(b) physicians' expense	674.35
(c) x-rays and medical supplies	
(d) nurses	0
(e) household help	\$1,500.00

20. The Plaintiff continues to be unable to work without difficulty and continues to lose time from work. It is expected that this condition will continue in the future.

21. The identity of any expert witnesses is not known to the Plaintiff at this time. This information will be supplied when available.

s/ Thomas W. Eggert

Subscribed and sworn to before

me this 30th day of January, 1974

s/ J. Lambert Haley
Notary Public

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

Plaintiff

-vs-

NORFOLK & WESTERN RAILWAY COMPANY
and
ERIE LACKAWANNA RAILWAY COMPANY

Defendants

ANSWERS TO
INTERROGATORIES

Civil Action No.
1973-370

Ford NW

The Plaintiff, for his answers to the Defendant's interrogatories, alleges as follows:

1. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.

The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, failed to properly maintain the seats in the said locomotive and also failed to provide a guard or safety device over the emergency brake valve.

The seats of the locomotive cab did not swivel or turn as they should have and the pipes and the valve and handle of the emergency air brake protruded out into the space which the Plaintiff occupied while working in the cab.

2. The Plaintiff sustained an internal derangement of the left knee joint with chondromalacia patellae and degeneration of the medial meniscus, resulting in weakness and instability of the left leg.

Appendix C
Plaintiff's Answers to Interrogatories.

3. The Plaintiff was confined to the hospital for 12 days, to his bed for approximately 4 weeks and to his home for a period of approximately 5 months except for occasional outings and visits to his doctor.

4. The Plaintiff was incapacitated from work from the date of the accident until about January 4, 1972 and again from June 4, 1972 to January 4, 1973. He has continued to lose time from work on many occasions since he returned.

5. (a) hospital expense	\$1,146.15
(b) physicians' expense	674.35
(c) medical expenses	
(d) nurses	0
(e) loss of earnings	39,000.00

6. The exact amount of damages to the Plaintiff is not known at this time.

7. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, violated the provisions of 45 USC 23 and failed to comply with all applicable provisions of every federal, state and local law, rule or regulation pertaining to the operation and maintenance of railroad locomotives.

8. The Plaintiff was seated on the front seat of the locomotive cab on the left side. He attempted to turn to the right and the seat did not swivel as it should have. The Plaintiff attempted to arise from the seat and his left knee struck an unguarded emergency air brake valve.

Appendix C
Plaintiff's Answers to Interrogatories.

9. The Plaintiff was a locomotive engineer.
10. This information is not presently available to Plaintiff.
11. Joseph D. Godfrey, M. D., Daniel E. Curtin, M. D., Richard L. Weiss, M. D., Bert A. Lies, Jr., M. D., 77 Bryant Street, Buffalo, New York and Samuel Militello, M. D., 3435 Bailey Avenue, Buffalo, New York.
12. We do not have the exact number of times the Plaintiff was treated by his physicians.
13. The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, did not provide the proper type of yard switching locomotive for the job which the Plaintiff and his crew were ordered to do. The locomotive the Plaintiff was operating was a road locomotive not properly suited for yard switching work.
- The Defendant, NORFOLK & WESTERN RAILWAY COMPANY, failed to provide the Plaintiff with safe equipment and did order the Plaintiff to work with an unsafe engine, knowing that said engine was unsafe. The Defendant failed to properly inspect the said engine and failed to dispatch any mechanics, car repairmen or other employees to repair or rectify the conditions.

Subscribed and sworn to
before me this 30th day of

January, 1974
S. J. Lambert Haley
Notary Public

s/ Thomas W. Egert

Appendix D
Judgment of Decision.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

v.

Civ- 1973-370

NORFOLK & WESTERN RAILWAY COMPANY
and ERIE LACKAWANNA RAILWAY COMPANY

SIR: Take notice of ~~BY ORDER~~ JUDGMENT ON DECISION BY THE
COURT

duly granted in the above entitled action on the 30th day
of October, 1975, and duly entered in the office of the
Clerk of the United States District Court, Western District
of New York, on the 30th day of October, 1975.

Dated: Buffalo, New York

October 30, 1975

JOHN K. ADAMS, Clerk
U.S. District Court
U.S. Courthouse
Buffalo, New York 14202

To Michael Semple, Esq.
Attorney for Plaintiff

To Richard Griffin, Esq.
Attorney for Defendant

Appendix D
Judgment of Decision.

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. **Civ-1973-370****THOMAS W. ROBERT**

vs.

JUDGMENT

**NORFOLK & WESTERN RAILWAY COMPANY and
ERIE LACKAWANNA RAILWAY COMPANY**

This action came on for trial ~~thence~~ **and a jury** before the Court/Honorable **JOHN T. ELFIN**

United States District Judge, presiding, ~~and the law was argued by the parties~~

~~and the law was argued by the parties~~

~~and the law was argued by the parties~~

commencing on October 28, 1975, and continuing on October 29, 1975,
on which date defendants' counsel moved for a directed verdict of
dismissal for failure of proof, and said motion having been granted
on October 30, 1975,

IT IS ORDERED AND ADJUDGED that the complaint is dismissed.

Dated at **Buffalo, New York**, this **30th** day
of **October**, 19 **75**.

JOHN K. ADAMS

Clerk of Court

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Appendix E
Notice of Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT

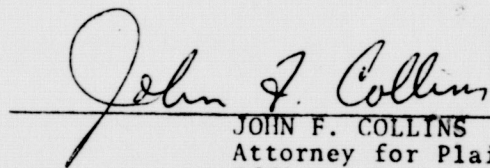
v.

NORFOLK & WESTERN RAILWAY COMPANY
and ERIE LACKAWANNA RAILWAY COMPANY

CIVIL ACTION NO.
1973-370

N-O-T-I-C-E
O-F
A-P-P-E-A-L

Notice is hereby given that Thomas W. Eggert, the plaintiff, hereby appeals to the United States Court of Appeals for the Second Circuit from a judgment on decision by the Court, entered the 30th day of October, 1975, dismissing plaintiff's complaint against the defendants, alleging a violation of the Federal Employer's Liability Act and granting defendants motion for a directed verdict against the plaintiff, which judgment and order was entered in this action on the 30th day of October, 1975 by the Honorable Judge John T. Elfvin, Federal District Court Judge, for the Western District of New York.



JOHN F. COLLINS
Attorney for Plaintiff
Office & P.O. Address
Suite 464 Statler Hilton
Buffalo, New York 14202

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Index to Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THOMAS W. EGGERT,

Plaintiff

v.

Civ-1973-370

NORFOLK & WESTERN RAILWAY COMPANY
ERIE LACKAWANNA RAILWAY COMPANY,

Defendants

INDEX TO RECORD ON APPEAL

1. Complaint
2. Summons and Marshal's return of service
3. Interrogatories of Defendant Norfolk & Western Railway Company
4. Answer of Defendant Norfolk & Western Railway Company
5. Answer of Defendant Erie Lackawanna Railway Company
6. Interrogatories of defendant Erie Lackawanna Railway Company
7. Notice of motion of Defendant Norfolk & Western Railway Company to compel answers to interrogatories and for dismissal
8. Thirty day order
9. Plaintiff's answers to interrogatories of Defendant Norfolk & Western Railway Company
10. Plaintiff's answers to interrogatories of Defendant Erie Lackawanna Railway Company
11. Defendant Erie Lackawanna Railway Company notice to take deposition of Plaintiff
12. Defendant Norfolk & Western Railway Company consent to substitution of attorneys
13. Judgment on Decision by the Court dismissing complaint
14. Plaintiff's consent to substitution of attorneys
15. Plaintiff's notice of appeal

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16. Transcript of examination before trial on March 11, 1975
17. Trial transcript

EXHIBITS

1. Plaintiff's Exhibit 1 - Photograph
2. Plaintiff's Exhibit 2 - Photograph
3. Plaintiff's Exhibit 4 - Photograph
4. Plaintiff's Exhibit 6 - Photograph
5. Defendants' Exhibit 1 - Photograph
6. Defendants' Exhibit 3 - Photograph

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Appendix G
Docket Entries.

CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date: 7/23/73

C. Form No. 106 Rev.

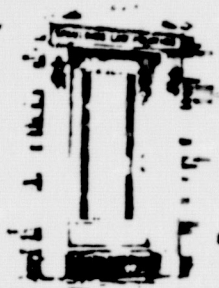
Civ-1973-370

TITLE OF CASE		ATTORNEYS			
THOMAS W. EGGERT 25A Garden Village Drive Cheektowaga, New York		For plaintiff: Kober & Weston -1200 Genesee Building- -Buffalo, New York---- -----F. Lambert-Haley-			
vs		Gerard Lankes, Esq. 785 Ellicott Square Building Buffalo, New York 14203			
NORFOLK & WESTERN RAILWAY COMPANY 1221 Clinton Street Buffalo, New York		John F. Collins (appeal) Suite 464 Statler Hilton Buffalo, N.Y. 14202			
ERIE LACKAWANNA RAILWAY COMPANY 1221 Clinton Street Buffalo, New York					
		For defendant:			
		-Hodgson, Russ, Andrews, Woods- & Goodyear -1800 One N & T Plaza -Buffalo, New York 14203			
		Richard F. Griffin Courtland R. Fairlee Moot, Sprague, Marcy, Landy, Fernbach & Smythe 2300 Two Main Place Buffalo, New York 14202			
STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed	Clerk	7/23/73	#9796	15.00	
		7/27/73	Treasurer of U.S.		
			U. S. 704		15.00
S. 6 mailed	Marshal				
asis of Action:	Docket fee				
F. E. L. A.	Witness fees				
ction arose at:	Depositions				

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Appendix G
Docket Entries.

Civ-1973-370 Thomas W. Eggert vs Norfolk & Western Railway Company & 1

[illegible]



Records and Briefs for State and Federal Courts

SPAULDING LAW PRINTING CO. ESTABLISHED 1881

313 MONTGOMERY STREET • SYRACUSE, N. Y. 13202 • PHONE AC 315 HA2-4803

RUSSELL D. MAY, Owner

LETTER OF TRANSMITTAL

Date: February 12, 1976

HON. A. DANIEL FUSARO, Clerk
U.S. Court of Appeals, Second Circuit
Room 1702 U.S. Court House
Foley Square
New York, New York 10007

Re: ~~Thomas Eggert~~ v. Norfolk & Western Railway Co. and Erie
Index No. - - Lackawanna Railway Co.

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

~~XXX Record~~

[25] Briefs & Appendix

~~XXX Original Record~~

~~XXX Original Record~~

Very truly yours,

~~XXXXXXXXXX~~

Thomas J. Lutz

cc: Collins, Collins & DiNardo, Esqs.

Affidavit of Service

Records and Briefs
For State and Federal Courts
Established 1881

313 Montgomery Street
Syracuse, New York 13202
(315) 422-4805

Russell D. Hay/President
Everett J. Rea/General Manager

Spaulding Law Printing

Re: **Thomas Eggert v. Norfolk & Western Railway Co. and
Erie Lackawanna Railway Co.**

State of New York)
County of Onondaga) ss.:
City of Syracuse)

THOMAS J. LUTZ,

Being duly sworn, deposes and says: That he is associated with Spaulding Law
Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **Collins, Collins & DiNardo**

Attorney(s) for **Plaintiff-Appellant,**

☒ He personally served three (3) copies of the printed ☐ Record ☒ Brief ☒ Appendix
of the above entitled case addressed to:

**MOOT, SPRAGUE, MARCY, LANDY,
FERNBACH & SMYTHE**

**Attorneys At Law
2300 Main Place
Buffalo, New York 14203**

**HODGSON, RUSS, ANDREWS,
WOOD & GOODYEAR**

**Attorneys At Law
One M & T Plaza
Buffalo, New York 14203**

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a
Post Office maintained by the United States Government in the City of Syracuse, New York.

☐ By hand delivery

Thomas J. Lutz
THOMAS J. LUTZ

Sworn to before me this **12th** day of **February, 1978.**

Donald E. Gunn
Notary Public
Commissioner of Deeds

cc: **Collins, Collins & DiNardo, Esqs.**